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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1110~~ 459 ~~441~~ 104

THE NEW ORLEANS & NORTH EASTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH H. S. JOPES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED SEPTEMBER 18, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1110.

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vs.

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INDEX.

	Original.	Print.
Caption	1	1
Transcript from State court	1	1
Declaration	2	1
Summons	6	3
Sheriff's return	7	4
Petition for removal	8	4
Bond for removal	10	5
Order for removal	11	6
Clerk's certificate	12	6
Plea and notice	13	7
Verdict and judgment	14	7
Order overruling motion for new trial	16	8
Bill of exceptions	16	8
Evidence for plaintiff	17	9
Deposition of Mrs. Alice Galender	17	9
E. J. Segerest	24	13
E. S. Walker	32	16
Chas. H. Ferrell	33	17
J. H. S. Jopes	35	18
Evidence for defendant	41	20
Deposition of Perry Rodgers	41	20
J. C. Carlin	44	21

JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 26, 1888.

	Original.	Print.
Deposition of Thos. J. Walker	46	22
Geo. W. Stockstill	47	23
Instructions to jury	48	23
Motion for new trial	49	24
Order fixing amount of bond	52	25
Writ of error	53	25
Bond	55	26
Citation and proof of service of same	57	27
Clerk's certificate	58	28
Assignment of errors	59	28

1 Pleas & proceedings had and done in the circuit court of the United States for the southern district of Mississippi, at a term thereof begun & held in the court-room, in the city of Jackson, on the 7th day of May, A. D. 1888, before the Hon. Robert A. Hill, U. S. district judge, present & presiding.

JOSEPH H. S. JOPES
vs.
THE NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY. } = 3462.

Be it remembered that heretofore, to wit, on the 13th day of June, 1887, there was filed in the circuit court of the United States for the southern district of Mississippi a transcript of the record in said case, which after due proceedings had in the circuit court of Hancock county, Miss., was transferred from the dockets of that court to said circuit court of the United States, wherein said case was proceeded in at Jackson, Mississippi. Appended hereto is a copy of transcript referred to.

STATE OF MISSISSIPPI, *Hancock County,* } *ss:*

In the Circuit Court, at the May Term, A. D. 1887.

JOSEPH H. S. JOPES
vs.
NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY.

Trespass.

Be it remembered that at a regular term of the circuit court, begun and held in & for said county, at the court-house in the
2 city of Bay St. Louis, on the 2d Monday in May, A. D. 1887, and on the 1st day of the term, being the 9th day of May, A. D. 1887, came on to be heard the above-entitled cause. The papers and proceedings are couched in the words & figures, to wit:

Declaration.

THE STATE OF MISSISSIPPI, *Hancock County:*

In Circuit Court, to May Term, 1887.

Joseph H. S. Jopes, plaintiff, by attorney, complains of the New Orleans & Northeastern Railroad Company, a corporation doing business in the county of Hancock, in the State of Mississippi, defendant, in action of trespass, for that whereas heretofore, to wit, on the 24th day of July, A. D. 1886, the said defendant, The New Orleans & Northeastern Railroad Company, a body politic & corporate, owned & operated a railway from the city of New Orleans, in the State of Louisiana, to the city of Meridian, in the State of Mississippi, and was a common carrier and engaged in the business

of transporting persons & property for him on the line of their said railway, and, being so engaged and a common carrier as aforesaid on the date last aforesaid, sold to said plaintiff a ticket on the line of said railway from Pearl River, a station on said line, to Derby, a station on said line in the county & State aforesaid, for which said plaintiff paid to said defendant the sum of eighty-five cents, in consideration whereof the said defendant undertook to transport
3 the said defendant from Pearl River to Derby, and the said plaintiff accordingly became a passenger on the cars of said defendant and embarked thereon for Derby, in the State of Mississippi. Plaintiff further avers that the said defendant on the day & year aforesaid, being a common carrier for hire, as aforesaid, and after said plaintiff had paid said defendant the said sum of eighty-five cents for transportation and his passage to Derby as aforesaid, and whilst said plaintiff was a passenger for hire in the cars of said defendant from Pearl River to Derby, as aforesaid, at, to wit, in the county aforesaid, with force and arms made an assault upon plaintiff, and beat, bruised, wounded, and ill-treated him and shot and discharged a pistol then & there loaded with gunpowder and leaden bullets at and against the said plaintiff, and thereby then & there, with bullets, struck and wounded said plaintiff in so grievous a manner that his life was by means thereof greatly despaired of, and by reason of such wounding the said plaintiff then and there became lame, sick, and disordered for a long time, to wit, from thence to the present time, and has been during all that time thereby rendered incapable of following and transacting his necessary affairs and business by him during that time to be done, and also thereby was forced and obliged to and did necessarily pay and expend the sum of $100 lawful money in and about endeavoring to be cured of the bruises, wounds, sickness, lameness, and disorder aforesaid occasioned
4 as aforesaid, and also said plaintiff has been permanently disabled for life and rendered physically unable to labor and attend to his business; wherefore the said plaintiff saith that he is injured and hath sustained damage to the amount of $30,000; and for that whereas heretofore, to wit, on the 24th day of October, A. D. 1886, the said defendant, The New Orleans & Northeastern Railroad Company, owned and operated a railway from New Orleans, in the State of Louisiana, to Meridian, in the State of Mississippi, and was a common carrier and engaged in the business of transporting persons & property for him along the line of their railroad, and, being so engaged in said business and being a common carrier, said defendant, to wit, the day and year last aforesaid, sold to plaintiff a ticket from Pearl River to Derby, on the line of said railroad, and received from plaintiff the sum of eighty-five cents, the fare charged by said defendant for transportation from Pearl River to Derby of said plaintiff on the cars of defendant, and delivered to him said ticket, and thereby contracted with plaintiff, for the consideration aforesaid, to transport him safely from Pearl River to Derby; that whilst on the car of said defendant and engaged in making the journey from Pearl River to Derby in pursuance of said contract, on the day & year last aforesaid, one John C. Carlin, the servant of said defendant

and the conductor of the car and train upon which said plaintiff was then being transported on the journey aforesaid, and
5 then being the agent of the defendant, having the control of the running of said train and being charged with the duty of treating said plaintiff respectfully and seeing that he was carried safely to his destination aforesaid, at, to wit, in the county of Hancock aforesaid, and before he had reached his destination aforesaid, with force & arms, made an assault upon plaintiff, and beat, bruised, wounded, and ill-treated and shot and discharged a pistol then & there loaded with gunpowder and leaden bullets at and against the said plaintiff, and thereby then & there with bullets struck and wounded said plaintiff in so grievous a manner that his life was by means thereof greatly despaired of, and by reason of such wounding the said plaintiff became sick & helpless, and after he had been so wounded almost to death the said defendant's servant, the said Carlin, rudely ejected said plaintiff from said car, saying to plaintiff: "Now, you son of a bitch, get off," and compelled plaintiff to discontinue his said journey and leave said train, by reason of all of which conduct of the said agent and servant of said defendant the said plaintiff then and there became sick, disabled, and disordered for a long time in body and in mind, from thence to the present time rendered incapable of following and transacting his necessary affairs and business by him during that time, and suffered and underwent
6 great pain and anguish of mind & body, and has been disabled permanently & for life from prosecuting his business and from earning his support, and also thereby the said plaintiff has — forced and obliged to and has necessarily — pay, lay out, & expend the sum of one hundred dollars, lawful money of the United States, in and about endeavoring to be cured of the bruises, wounds, sickness, soreness, lameness, and disorder aforesaid, and other wrongs the said defendant, by its agent and servant, the said John C. Carlin, then & there did to the great damage of the said plaintiff; wherefore the said plaintiff saith that he is injured and hath sustained damage to the amount of $30,000.

And therefore he brings his suit and demands judgment for the sum of $30,000, the amount of his damages, together with the costs of this suit.

T. S. FORD,
Att'y for P'ff.

Filed April 30th, 1887.

E. H. HOFFMAN, *Clerk.*

Circuit Court Summons & Return.

The State of Mississippi to the sheriff of Hancock county, Greeting:

We command you hereby that you summon The New Orleans & Northeastern Railroad Company, defendant, if to be found in your county, so that they be before the circuit court to be holden in and for said county, at the court-house thereof, in the city of Bay
7 St. Louis, on the 2d Monday of May, 1887, to answer the

declaration of Joseph H. S. Jopes, plaintiff, against the said defendant, now on file in the clerk's office of said court, and have then & there this summons.

Witness the Honorable Samuel H. Terral, judge of the 7th judicial district of said State, the 2d Monday of November, 1886, & seal of said court.

Issued the 30th day of April, 1887.

[SEAL.] E. H. HOFFMAN, *Clerk.*

The declaration on file is founded on an action of trespass, for that the said Joseph H. S. Jopes, plaintiff, saith that he is injured by the said New Orleans & Northeastern Railroad Company, defendant, and its agent & servant, and that he hath sustained damage to the amount of ten thousand dollars, and therefore he brings his suit, &c.

The amount actually demanded in this suit is the sum stated in said declaration and lawful interest & costs. Judgment will be demanded at return term.

T. S. FORD, *P. Q.*

Declaration filed when summons issued.

[SEAL.] E. H. HOFFMAN, *Clk.*

Return, &c., rec'd in office Ap'l 30th, 1887.

JOSEPH F. CAZENNER,
Sherriff H. C'ty, Miss.

STATE OF MISSISSIPPI, *Hancock County:*

I hereby appoint and constitute James B. Truly my lawful
8 deputy to execute this writ this 2d d'y of May, 1887.

JOSEPH F. CAZENENER,
Sherriff H. C'ty, Miss.

Executed the within process May 3d, 1887, by handing a true copy of same to H. Williams, agent of said New Orleans & Northeastern Railroad Company, at Nicholson Station.

JOSEPH F. CAZENVENOR,
Sherriff H. C'ty, Miss.,
By JAMES B. TRULY, *Special Deputy.*

Petition for Removal of Cause, &c.

In the Circuit Court of Hancock County, Mississippi.

JOSEPH H. S. JOPES, Plaintiff,
vs.
THE N. O. & N. E. R. R. Co., Def't.

Petition for the removal to the circuit court of the United States, southern district of Mississippi.

To said circuit court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds,

exclusive of costs, the sum or value of two thousand dollars; that the controversy in said suit is between citizens of different States, and that the petitioner was at the time of the commencement of this suit and still is a citizen of the State of Louisiana, and that plaintiff was then and still is a citizen of the State of Mississippi, and that
9 —— —— then & still — a citizen of the State of ——, and your petitioner offers herewith a bond, with good & sufficient surety, for its entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto; and he prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into the said circuit court of the United States in & for the southern district of Mississippi, and it will forever pray, &c.

E. WATKINS,
Att'y for Petitioner.

Affidavit of Petitioner, &c.

STATE OF MISSISSIPPI, *Hancock County:*

In the Circuit Court. May Term, 1887.

JOSEPH H. S. JOPES

vs.

THE NEW ORLEANS & NORTHEASTERN R. R'D.

Personally came before the undersigned, clerk of the circuit court in & for said State & county, E. Watkins, attorney of said defendant R. R. Co., who, being duly sworn, deposes and says the amount
10 in controversy in said suit exceeds the sum of two thousand dollars, exclusive of costs, and that the said defendant is a non-resident corporation and a resident in and a corporation, under the laws of the State of La., and that he verily believes that from prejudice or local influence the said defendant will not be able to obtain justice in said court in said cause. This affidavit is filed with and made a part of the annexed petition of said defendant for the removal of said cause to the United States circuit court for the so. dist. of Miss.

E. WATKINS.

Sworn to & subscribed before me this May 9th, 1887.
E. H. HOFFMAN, *Clerk.*

Filed May 9th, 1887.
E. H. HOFFMAN, *Clerk.*

Bond, &c.

Know all men by these presents that The New Orleans & Northeastern R. R'd, as principal, and E. Watkins, as sureties, are held and firmly bound to Joseph H. S. Jopes in the penal sum of five hundred dollars, the payment whereof, well & truly to be made unto the said Joseph H. S. Jopes and his heirs & assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents; yet upon these conditions: The said New Orleans & Northeastern R. R'd Co. having petitioned the circuit court of Hancock county, State of Mississippi, for the removal of a certain
11 cause therein pending, wherein Joseph H. S. Jopes is plaintiff and the N. O. & N. E. R. R'd defendant, for removal to the circuit court of the United States in & for the southern district of Mississippi:

Now, if the New Orleans & Northeastern R. R'd, your petitioner, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

NEW ORLEANS & NORTHEASTERN R. R'D, [SEAL.]
By E. WATKINS, *Att'y.* [SEAL.]
E. WATKINS. [SEAL.]

I approve the foregoing bond and surety this 9th day of May, 1887.
S. H. TERRAL, *Judge.*

Filed May 9th, 1887.
E. H. HOFFMAN, *Clerk.*

Order of Court, &c.

JOSEPH H. S. JOPES *vs.* THE N. O. & N. E. R. R'D.

Defendant having filed its affidavit, petition, & bond for removal of this cause to the U. S. circuit court for the southern district of Miss., and the bond having been approved, said defendant is allowed sixty days to plead, & this court will proceed no further with said cause.

Minute Book, = 4, page 249.

12 STATE OF MISSISSIPPI, } ss:
Hancock County. }

I, Emile H. Hoffman, clerk of the circuit court in & for the county & State aforesaid, do hereby certify that the annexed and foregoing fourteen pages contain a true & complete transcript of all the original papers and proceedings in said cause, as fully and completely as the same appears on file and of record in our said court.

Given under my hand and the seal of said court hereto affixed, at office, in the city of Bay St. Louis, this 30th day of May, 1887.

[SEAL.] E. H. HOFFMAN, *Clerk.*

[Endorsed:] No. 3462. U. S. circuit court, so. dist. Miss. Joseph H. S. Jopes *vs.* N. O. & N. E. R. R. Co. Transcript. Filed June 13th, 1887. Jas. M. McKee, clerk.

13 *Plea & Notice.*

In the Circuit Court of the United States for the Southern District of Mississippi.

Jos. H. S. Jopes

vs.

The New Orleans & Northeastern Railroad Company.

And now comes the said defendant, by attorney, and, for plea in this behalf, says it is not guilty of the trespasses alleged against it in said declaration, and of this it puts itself upon the country.

FEWELL, WATKINS & BRAHAN, *P. D.*

Notice.

The plaintiff will take notice that under the foregoing plea the defendant will prove that the plaintiff was intoxicated and was guilty of rude & insulting language, and when he was shot by the defendant's conductor he, the plaintiff, was advancing on said conductor with a drawn knife, and that the conductor was in im-ment danger of great bodily harm from the plaintiff, whose manner indicated a purpose to cut & stab said conductor with said knife, and that said conductor acted in self-defense; and the defendant will further show that the difficulty between the plaintiff and said conductor was a personal difficulty, for which the defendant was not in anywise responsible, and out of which the plaintiff can have no recovery against the defendant.

F., W. & B., *P. D.*

14 & 15 *Jury & Verdict.*

Minute Book 6, p. 110.

In the Circuit Court of the United States for the Southern District of Mississippi. May Term, 1888.

Joseph H. S. Jopes
vs.
N. O. & N. E. R. R. Co. } = 3462.

Tuesday, *May 15th*, 1888.

Came the parties, by their attorneys, and, issue being joined, came a jury of good & lawful men, to wit, A. V. Liddell and eleven others,

who, being duly elected, empanneled, and sworn and charged according to law and the issue submitted to them, upon their oaths do say: We, the jury, find for the plaintiff, and assess his damages for nine thousand five hundred dollars. It is therefore considered by the court and so ordered and adjudged that the plaintiff, J. S. Jopes, do have and recover of the defendant, The New Orleans & Northeastern Railroad Company, the sum of nine thousand five hundred dollars, with six per cent. interest per annum from date until paid, together with the costs of this suit to be taxed, for which let execution issue.

Ordered this May 15th, 1888.

(Signed) R. A. HILL, *Judge.*

16 *Order Overruling Motion for New Trial.*

In the Circuit Court of the United States for the Southern District of Mississippi. May Term, 1888.

JOSEPH S. JOPES
vs. } 3462.
N. O. & N. E. R. R. Co.

MAY 26TH, 1888.

Came again the parties, by their attorneys, and the motion of defendant for a new trial in said cause was argued and submitted to the court, and it is now considered by the court that said motion be overruled; to which judgment of the court in overruling *in overruling* said motion the defendant in open court excepted.

R. A. HILL, *Judge.*

Minute Book 6, page 128.

Bill of Exceptions.

In the Circuit Court of the United States for the Southern District of Mississippi.

Be it remembered that on the fourteenth day of May, 1888, at a regular term of said court begun & held at Jackson, Mississippi, and regularly organized, there came on to be tried the
17 case of Joseph H. S. Jopes *vs.* The New Orleans & Northeastern Railroad Company. The jury having been regularly empanneled, the following testimony was adduced on the part of the plaintiff:

The plaintiff read in evidence the deposition of Mrs. Alice Galander as follows:

In the Circuit Court of the United States for the Southern District of Mississippi.

J. H. S. JOPES
vs.
NEW ORLEANS & NORTHEASTERN RAILROAD CO.

Interrogatories to be propounded to Mrs. Alice Galander, a witness for plaintiff in the above-styled cause, residing at Lacy, Mississippi, more than 100 miles from the city of Jackson, Mississippi, by the usual route of travel, whose deposition, when taken on the following interrogatories and such cross-interrogatories as may be attached thereto, will be read in evidence on the trial of said cause on behalf of plaintiff.

Int. 1. State your name, age, residence, & whether on July 4th, 1886, you traveled with Mr. J. H. S. Jopes on the New Orleans & Northeastern railroad. If so, where did you get on the train? Did Mr. Jopes get on the train with you? Did you have your little children with you? If so, did any one assist you to get them on the train? If so, who was it?

Int. 2. State whether or not Mr. Jopes on that day was intoxicated.

18 Int. 3. How far did you travel on that train with Mr. Jopes?

Int. 4. Where was Mr. Jopes when the conductor came to collect his fare—in what car? How far were you from him?

Int. 5. State whether or not you heard — was said by Mr. Jopes to the conductor when the conductor was collecting fare from Mr. Jopes. Were you close enough to perceive Mr. Jopes' manner towards the conductor while he was collecting his fare; if so, was it pleasant or quarrelsome? State whether during the time the conductor was collecting Mr. Jopes' fare Mr. Jopes was laughing.

Int. 6. State whether Mr. Jopes remained in the ladies' car until the train got nearly to Nicholson.

Int. 7. State whether or not the conductor & Mr. Jopes had any further conversation after the fare was collected from Jopes. If so, what was Mr. Jopes' manner in that conversation, pleasant or quarrelsome? Did you hear what was said in the conversation?

Int. 8. Did you see the shooting? How long after Mr. Jopes left the car where you were before the shooting commenced? How long before the train got to Nicholson did Jopes leave the car where you were?

Int. 9. State anything else you may know material to the

19 issue of advantage to either party to this suit.

CALHOUN & GREEN,
For Plaintiff.

Cross-Interrogatories.

1. Is Jopes related to you or connected with you in any way? If so, state such relation or connection fully.

2. How far did you reside from Jopes at the time referred to in the direct interrogatories?

3. How long have you known Jopes and where has he lived during the time you have known him?

4. At what point did you leave the cars that day?

5. How came you to be with Jopes?

6. Did not Jopes say he did not pay fare on that road, or words to that effect?

7. Do you pretend to have heard all that Jopes said to the conductor?

8. Did not Jopes say to the conductor that he, Jopes, would see the conductor again, or words to that effect?

8. Did you not see Jopes with a knife that day? Did he not have the knife open?

9. Did you not hear the conductor from the outside about the time of the shooting say, "Put up that knife," or something about a knife; if so, what did he say?

20 10. State on which side of the car you sat and about what part of the car. And did you remain in your seat during the shooting.

11. With whom have you conferred about your testimony; from whom have you received letters? Append to your deposition any and all letters you have received about this matter.

12. How many times and when & where have you talked with Jopes about this matter? State fully.

13. Have you or has your husband any business or other relation or connection with Jopes? If so, state it fully.

14. Did you at any time see Jopes with a knife?

15. Do you pretend that you saw all that occurred between the parties?

16. Were the questions read over to you before you commenced your answers, or did the officer put the questions to you as they came without any information on your part as to what was to follow? Answer this fully.

J. W. FEWELL,
For R. R. Co.

Agreement.

It is hereby agreed that the deposition of Mrs. Alice Galander may be taken before any officer qualified to administer an oath, upon the foregoing interrogatories & the cross-interrogatories hereto attached, without the issuance of a commission, all formalities being waived and objections as to competency of interrogatories and answers being alone reserved.

J. W. FEWELL,
For R. R. Co.
CALHOUN & GREEN,
For Pff.

21 Deposition of Mrs. Alice Galendar, a witness for plaintiff in the case of J. H. S. Jopes against The New Orleans and Northeastern Railroad Company, pending in the circuit court of the United States for the southern district of Mississippi.

This day personally appeared before me, the undersigned, a justice of the peace of Hancock county, State of Mississippi, Mrs. Alice Galendar, a witness on the part of plaintiff in the case of J. H. S. Jopes against The New Orleans & Northeastern Railroad Company, pending in the United States circuit court for the southern district of Mississippi; said witness, being first duly sworn, deposes as follows, to wit:

Answer to 1st Int. My name is Alice Galendar; age, 38 years; residing near Lacy, Miss. I traveled with J. H. S. Jopes on the New Orleans & Northeastern railroad on the 24th day of July, 1886; got on the train at West Pearl station. Mr. Jopes got on the train with me. My little children were with me, and I was assisted to get them on the train by Mr. Jopes.

Ans. Int. 2. Mr. Jopes, on that day, was not intoxicated. I traveled from West Pearl station to Nicholson, a distance of about eight miles.

Ans. to Int. 3. When the conductor came to collect fare from Mr. Jopes he was in the ladies' car, about six or eight feet from me.

22 Ans. to Int. 4. Did not understand the conversation between Mr. Jopes & the conductor when the latter was collecting the fare. I was close enough to perceive Mr. Jopes' manner towards the conductor while he was collecting the fare, which manner was pleasant, and during the time Mr. Jopes was laughing.

Ans. Int. 6. Mr. Jopes remained in the ladies' car until — got to Nicholson.

Ans. Int. 7. Mr. Jopes & the conductor had no further conversation that I heard after the fare was collected.

Ans. to Int. 8. Did not see the shooting. The shooting commenced in about half minute after Mr. Jopes left the car where I was. Mr. Jopes did not leave the ladies' car until the train got to Nicholson.

Answers to Cross-Interrogatories.

1st Int. Mr. Jopes is no relation of mine or connected with me in any way.

Ans. to X Int. 2. I resided about five or six miles from Mr. Jopes at the time referred to.

Ans. to X Int. 3. I have known Mr. Jopes fifteen or twenty years. He has lived at Gainesville & Florensville during the time I have known him.

Ans. to X Int. 4. I left the car at Poplarville that day.

Ans. to X Int. 5. The reason of my being with Mr. Jopes that day — we were expecting to travel in the same direction & on the same train, and met at the depot.

23 Ans. to X Int. 6. Did not hear Mr. Jopes say that he did not pay fare on that road, or any words to that effect.

Ans. to X Int. 7. Did not hear the conversation or could not understand what Mr. Jopes said to the conductor.

Ans. to X Int. 8. Did not hear Mr. Jopes say to the conductor that he would see him again, or any words to that effect.

Ans. to X Int. 9. Did not see Mr. Jopes with any knife.

Ans. to X Int. 10. Did not hear any remarks of the conductor from outside, about the time of shooting, in regard to a knife.

Ans. to X Int. 11. I sat on the right-hand side of the car, about twenty feet from the front end; did not leave my seat during the shooting.

Ans. to X Int. 12. Have rec'd only one letter from Green and Calhoun asking what I knew about the case, which letter I replied to.

Ans. to X Int. 13. Have never had any talk with Mr. Jopes about this matter.

Ans. to X Int. 14. Neither myself or husband have any connection or business relations with Mr. Jopes.

Ans. to X Int. 15. Did not at any time see Mr. Jopes with a knife.

Ans. to X Int. 16. I do, except the shooting.

Ans. to X Int. 17. The questions were read over to me as they came without any information on my part as to what was to follow.

her
ALICE x GALENDAR.
mark.

Sworn to & subscribed before me this 21st day of November, 1887.
J. J. MITCHELL, *J. P.*

24 STATE OF MISSISSIPPI, *Hancock County:*

I, J. J. Mitchell, a justice of the peace in & for said county & State, do hereby certify that Mrs. Alice Galendar, the witness above named, appeared before me at the time specified and testified as above stated, which deposition, being by me taken down in my own handwriting and being read over to said witness, was by her approved, sworn to, and subscribed; all which I enclose and direct to the clerk of the circuit court of the United States for the southern district of Mississipi.

Witness my hand and seal this 21st day of November, 1887.
J. J. MITCHELL, *J. P.* [SEAL.]

Filed Nov'r 22d, 1887.

JAS. M. McKEE, *Clerk,*
P'r R. H. WINTER, *D. C.*

The plaintiff next read in evidence the deposition of E. J. Segerest, as follows:

In the Circuit Court of the United States for the Southern District of Mississippi.

J. H. S. JOPES
vs.
NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY.

Interrogatories to be propounded to E. J. Segerest, a witness for plaintiff in the above-styled cause, residing at Nicholson, Mis-
25 sissippi, more than 100 miles from the city of Jackson, State of Mississippi, by the usual mode of travel, whose deposition, when taken on the following interrogatories and such cross-interrogatories as may be attached hereto, will be read in evidence on behalf of plaintiff on the trial of the above-styled cause.

Int. 1. State your name, age, residence, and occupation and where you were on July 4th, 1886. State whether you said the conductor of the New Orleans & Northeastern Railroad Co. shot J. H. S. Jopes on that day.

Int. 2. State whether you saw the conductor before he shot. If so, where was he? Did the conductor walk down the platform at Nicholson station; if so, how far did he walk down? State fully all you saw then; where Jopes was standing when shot at. What was Jopes doing when shot at and just before he was shot at?

Int. 3. If you shall answer that the conductor was walking down the platform, state, if you know, for what purpose he walked down. What did the conductor do while on the platform? If you shall say the conductor shot at Jopes, how many times did he shoot?

Int. 4. What did Jopes do when he was shot at? What did the conductor do while firing & immediately after?

26 Int. 5. How far was Jopes from the conductor when the first shot was fired?

Int. 6. Did Jopes stay on the cars after he run back, if you shall say that he did run back after the first shot? If not, why not?

Int. 7. Describe fully all that you saw there, that day, how the shooting came about, who commenced it, who did the shooting, and all that occurred there, as if specially interrogated upon each point, and also whether Jopes was intoxicated.

Int. 8. State anything else you may know material to the issue of benefit to either party to this suit.

Cross-Interrogatories.

1. State what relation or connection you bear towards Jopes.

2. How long have you known Jopes & where have you known him? Where has he resided for the last ten years?

3. What business or other connection have you with Jopes? State fully.

4. Give the names of all the persons who saw the difficulty,
27 as far as you can remember, and their places of residence.

5. Where were you standing or sitting, with reference to Jopes and Carlin, when the difficulty was going on? Give fully the situation of the parties.

6. When did Jopes leave the train, at what part of the train, and when did Carlin leave it?

7. What became of the knife Jopes had—where was it when you first saw it?

8. Did not Jopes approach Carlin from behind, at Carlin's back, and did he not then have a knife in his hand or up his sleeve?

9. Whom have you talked with about this matter? If you have received any letter or letters referring to it append them to your answer.

10. Were the interrogatories read over to you before your answers commenced, or were the questions put to you as they were reached without any knowledge on your part of what was to follow?

JNO. W. FEWELL, *For Co.*

Agreement.

It is hereby agreed that the deposition of the foregoing
28 witness, E. G. Sigerett, may be taken before any officer qualified to administer an oath, upon the foregoing interrogatories and cross-interrogatories hereto attached, without the issuance of a commission, all formalities being waived, all objections as to competency of interrogatories and answers being alone reserved.

JNO. W. FEWELL, *For R. R. Co.*
CALHOUN & GREEN, *For P'ff.*

Answers.

STATE OF MISSISSIPPI, *Hancock County:*

In the Circuit Court of the United States for the Southern District of Mississippi.

J. H. S. JOPES
vs.
NEW ORLEANS & NORTHEASTERN RAILROAD CO.

This day personally appeared before the undersigned, justice of the peace of said county, E. J. Sigerest, a witness in behalf of the plaintiff in above-styled cause now pending and undetermined in the circuit court of the United States for the southern district of Mississippi. Said witness, being first duly sworn, deposes as follows, to wit:

Ans. to 1st Int. My name is E. J. Sigerest; age, 43 years; a resident of St. Tammany parish, La.; occupation, wheelwright; I was at Nicholson, Miss., on the 4th day of July, 1886; I saw the conductor of the New Orleans & Northeastern railroad shoot J. H. S. Jopes on that day.

29 Ans. to Int. 2. I saw the conductor before he shot; he was near the corner of depot-house; he walked down the platform

about a car and a half. When op-osite Mr. Jopes, who was standing on the platform of the car, he commenced firing, and shot Mr. Jopes three times; when the last shot was fired Mr. Jopes had retreated back inside the car, and the conductor rushed in after him; did not see Mr. Jopes make any attempt to harm the conductor; do not know what Mr. Jopes was doing before the shooting, but heard him remark to the conductor, "You have killed me for nothing."

Ans. to Int. 3. Do not know the conductor's purpose in walking down the platform; did not see him do anything while on the platform, but shoot at Jopes three times.

Ans. to Int. 4. He retreated back inside the car after the 3d shot was fired, and the conductor rushed in after him.

Ans. to 5th Int. Mr. Jopes was about 4 feet from the conductor when the first shot was fired.

Ans. to 6th Int. Mr. Jopes, after being shot, run back in the car, but did not remain on the car, but was carried to the hotel.

30 Ans. to 7th Int. I do not know how the shooting came about, but, as far as I know, the difficulty was instigated by the conductor who did the shooting. Mr. Jopes did not say anything to the conductor until after the shooting. Jopes was not intoxicated and had no weapons, none being found when his clothing was removed, which I assisted in doing.

Cross-Interrogatories.

Ans. to 1st. I am in no way related to Mr. Jopes and have no business connection with him.

Ans. to 2d X Int. I have known Jopes 15 years in Hancock county, Miss., where he has resided since my acquaintance with him.

Ans. to 3d X Int. I have no business or connection with Jopes whatever.

Ans. to 4th X Int. I do not know & can give only the names of Guenea Walker, of Nicholson, Miss., and Charles Ferrell, of Slidell, La., who said they saw the shooting.

Ans. to 5th X Int. I was sitting on the store gallery of Willis Bros. when the shooting commenced. Jopes was standing on the platform of the car with his hands on the rails. Carlin

31 walked down the depot platform the length of about a car & a half to op-osite where Jopes was standing and began shooting.

Ans. to 6th X Int. Jopes left the train at Nicholson about the 2d or 3d car from the baggage car. Do not know when Carlin left it.

Ans. to 7th X Int. Mr. Jopes did not have any knife; did not see it.

Ans. to 8th X Int. Mr. Jopes did not approach Carlin from behind, at Carlin's back. Jopes had no knife in his hand or up his sleeve.

Ans. to 9th X Int. I cannot remember all the parties talked with about this matter, but remember having talked with Mr. Jopes at the court-house in Bay St. Louis, Miss; have rec'd one letter from Jopes' attorney.

Ans. to 10th X Int. The interrogatories were not read over to me

before my answers commenced, but the questions were put to me without any knowledge on my part as to what was to follow.

E. J. SEGEREST.

Sworn to & subscribed before me this 31st day of December, 1887.

J. J. MITCHELL, *J. P.*

I, J. J. Mitchell, a justice of the peace in & for the county
32 of Hancock, State of Mississippi, do hereby certify that E. J. Segerest, the above-named witness, appeared before me at the time specified and testified as before stated, which deposition, being by me taken down in my own handwriting and being read over to said witness, was by him approved, sworn to, & subscribed.

J. J. MITCHELL, *J. P.*

The plaintiff then introduced as a witness E. S. WALKER, who, being duly sworn, testified as follows:

I live in Hancock county, Miss. The day that Jopes was shot I was at Nicholson station, sitting on the front steps of Willis' store, which was about 40 yards from where the smoking car stop-ed; saw a man in uniform, who I supposed was the conductor, get off the front end of the baggage car, the next to the engine, and walk down the depot platform north towards the rear of the train. Mr. Jopes came out of the rear end of the smoking car, I think it was, and stood on the car platform and stood with his hands on the railing, and he was standing still when the conductor, Mr. Carlin, came by within a few feet of him, walking on the depot platform, & commenced shooting at him. He shot at him 4 times very rapidly, he saying nothing to Jopes and Jopes saying nothing to him that I could hear. Jopes retreated into the door of the car, on the platform of which he was standing, and Carlin, the conductor, followed him into the car, when some one,
33 whom I took to be one of the trainmen, caught Carlin by the arm. Jopes went through the car into which he retreated and came out at the other end of it onto the depot platform, and said to Carlin, "Johnny, you have killed me. What did you do it for?" and Carlin answered, "That's all right." Just at the close of the shooting Mr. Willis came up and asked, "What's all this about?" and Carlin answered, "I shot the damn son of a bitch."

(To the admission of all this evidence as to what Willis, Carlin, & Jopes said the defendant objected; but the court overruled the objection and held this testimony admissable as part of the *res gestæ;* to which ruling defendant then & there excepted.)

Jopes was carried to the hotel. There was one ball in his breast, one in his side, and one or two in his arm. I am not of kin to plaintiff and have never had any business connection with him. Jopes was not intoxicated.

The following was added in the handwriting of the judge presiding at the trial, to wit:

"The proof showed that the remarks made between the plaintiff and Carlin took place immediately after the shooting; and to the admission of which the defendant excepted."

The plaintiff then introduced CHARLES H. FERRELL, who was sworn & testified as follows:

I reside in New Orleans and am twenty-two years of age;
34 am of no kin to the plaintiff, and have never had any business connection with him and I never saw him until the day of the shooting, nor have I seen him since that day until I came up to attend this trial. I got on the north-bound train on the defendant's railroad on the 24th July, 1886, at Slidel, seven miles south of Pearl River station. The plaintiff Jopes sat near me in the car in a seat on the op-osite side of the isle from me. I think we were in the smoker. It may be that we were first in the ladies' and came out of that into the smoking car. I am not sure. There were ladies in the car in which we sat. When the conductor, Carlin, came to collect the fares Jopes was in the isle going to the water-cooler. He & the conductor had some conversation, but I did not hear what was said, when Carlin slapped Jopes on the shoulder in a friendly way & both of them laughed, and Carlin & Jopes passed each other in the car isle. When the train reached Nicholson station I got up to go out, & did go out, between the front of smoking car and the rear of the baggage car, Jopes coming along behind me. I got off the train & started towards the station-house. I heard a pistol fired at my back & whe-led round & saw Carlin shooting at Jopes, Carlin being on the depot platform & Jopes being on the car platform. I was standing close to them and heard neither one of them say anything, and I did not see Jopes doing anything to Carlin. Jopes threw his hands up and
35 stag-ered back into the smoking car. Carlin started into the car after Jopes, but two men, whom I took to be trainmen, caught hold of his arms. When I wheeled around at the first shot Jopes was standing on the car platform and Carlin was on the depot platform firing at Jopes—shooting between the end of the baggage car and the end of the smoking car. Carlin fired very rapidly. He fired 4 shots at Jopes, I think. Immediately after the shooting Willis came up and said, "What is all this about?" and Carlin said, "I have shot the shit out of the damned rascal." When Jopes went into the front end of the smoking car he went through it and came out of the back door down by the platform and said to Carlin, "Eddie (I think he called him Eddie), you have killed me for nothing;" and Carlin said, "That's all right." (Defendant objected to this testimony as to what Willis and Jopes & Carlin said, but the court overruled the objection, holding it to be part of the *res gestæ*; to which ruling of the court defendants excepted.) Jopes was not intoxicated and was doing nothing improper on the train. I was in Jopes' presence all the time after he got aboard until I went out at Nicholson. Jopes came out behind me and stood upon the car

platform. I was only four or five feet from Carlin when the shooting commenced.

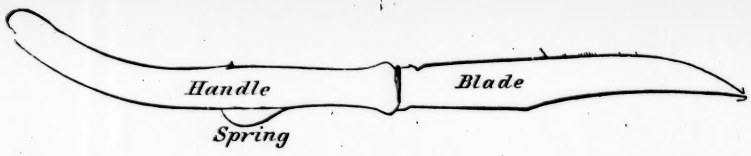
The plaintiff, J. H. S. JOPES, then testified on his own behalf, having been first duly sworn, as follows:

My name is Joseph H. S. Jopes. I am thirty-three years
36 of age. I have a wife & four children depending on me. I was living at Florinville, on the P. & F. R. R., in the employment of Portevent & Favre. One of my children was sick and my mother-in-law came down to get my wife and children to go home with her to Derby, Miss. So in the course of a week I started to go to Derby to see my family. I came on the P. & F. road, and within about a mile of Pearl River station, on defendant's road, which point I reached on foot pretty early in the morning of the 24th of July, 1886, I got on the north-bound train of defendant's road, of which train Mr. Carlin was the conductor. I had under my care a lady and some children who were going on the train upon which I was going. I took a seat near the lady and her children. When Mr. Carlin came to get the fare I met him in the aisle of the car as I was going to the water-cooler. He asked me for my fare, and I told him the other boys did not charge me anything on this road. He said you must pay your fare. I did so, paying my fare to Derby, eighty-five cents, handing him a two-dollar bill, and he handed me back the change and gave me this receipt. (Here the witness produced the conductor's receipt for the eighty-five cents for fare, which was offered and read to the jury in evidence and admitted to be a valid receipt of defendant for the fare.) I then said to him in a joking way, "You have taken people to Meridian and back free,"
and he says, "She won't say so." I said, "She does say so,"
37 and I am going to squeal on you. I was referring to a Mrs. Ferrell in these remarks. It was all said in a joke, and he & I laughed and he went on collecting his fares. I meant to say in a jocular way that I would report him, but had no purpose to do so, and there was nothing at all unpleasant between the conductor and me. When the car blew for Nicholson station I was sitting on a seat in the car scraping my finger nails with a pocket-knife. When the whistle blew for Nicholson station I walked out on the platform of the car, still having the knife in my hand and holding it in my grasp by the blade on the platform of the car with that hand in which the knife was on the railing of the car and looked out at the station, expecting that I might possibly see my brother-in-law among the people there, as he lived near that station, to inquire how my family was. I did not see Mr. Carlin at all until he commenced shooting at me from the depot platform while I was standing on the car platform. He shot at me three or four times and I retreated into the car, and he followed me up & put his pistol to my face and said, "Give me that knife," which I did, and I either handed him the knife or let it drop, I don't know which, and as soon as I gave him the knife he said, "Now get off, you son of a bitch." At which two brakesmen & a porter belonging to the train

caught hold of him and I went rapidly through the car & got
off at the other end, though I had paid my fare to Derby,
38 which is twenty miles further than Nicholson. The defend-
ant has never returned me my fare or any part of it, nor
offered to return any of it. I was not intoxicated and had taken
only one drink that day, an ordinary-sized drink, and that one
three hours before the shooting. One of the balls which Mr. Carlin
shot had entered my left shoulder in front and went into my breast,
ranging from left to right. Another one struck me in my left side,
passed entirely through my body and both lungs, also going from
left to right. Another one struck me a glancing lick in my breast
& came out at my right side, also going from left to right. From
these wounds I laid in bed about three weeks and suffered a great
deal, and was not able to go about much until about three months
had elapsed. I have not been able to do any hard work since, but
can only do very light jobs. I am a laboring man and make my
living by my labor, and was able from its proceeds to support my
family comfortably, and since the shooting I have never been able
to do the work of my regular business or any regular work at all.
A very little work now gives me such a pain in the lungs as lays me
up for a week or two. I cannot stand change of temperature; it
gives me a violent pain in the lungs.

Cross-examination:

"I was not intoxicated at all; had not taken but one drink,
39 and that was at Pearl River station, when I first got to the
depot that morning, about three hours before the shooting,
and that was a light drink. Nothing unpleasant occurred between
Carlin and me in the car. I did not call Mrs. Ferrell's name at all
when I said, You carried people to Meridian & back, and when he
answered, 'She won't say so,' he seem- to understand what I re-
ferred to. All that I said was jocular. After Carlin went out I sat
down. I took out my knife and was scraping my finger nails, and
when the train got to Nicholson I went out with the knife open in
my hand, with the blade in my grasp, and, as I stood on the plat-
form of the car, I had my hand which had the knife in it on the car
rail 'sorter' under my hand on the rail next to the car, holding it
by the blade. It was a pocket-knife, with a spring on the back to
hold the blade open, and it had a black handle, I think. I do not
recollect whether or not it had more than one blade. I had only
had the knife in my possession three or four days, and had borrowed
it from one of the men in the shop, where I worked, to make a wedge
with. I was foreman of some hands on the P. & F. road." (Here
the knife was shown to plaintiff, and he was asked if it was the same
knife, and he said, "If it was not the same knife it was a knife ex-
actly like it, and he believed it to be the same knife.") The knife
was then offered by the defendant in evidence to the jury,
40 and is of size & shape as shown in the following drawing of
it, with a spring in the back to hold it open



when it is opened. The witness then proceeded to state: "I did not at any time have the knife up my sle-ve, and did not advance on Carlin with it. I did nothing to cause Carlin to shoot me. I did not say to any one that I would get even with Carlin. I knew Carlin well as one of difendant's conductors running trains on
41 the road. I was not at or about that time nor before then in the habit of getting drunk. I have been drunk several times in my life, but had not been drunk for a long time before the — of the shooting, and I am not what you could call a drinking man, though I sometimes take a drink, but do not drink regular; nor was I a violent man and had had no difficulties with anybody."

The plaintiff here rested his case and the defendant introduced the deposition of Perry Rogers, as follows:

(Copy.)

CINCINNATI, OHIO, *May 17th*, 1887.

I left New Orleans on July 24th, 1886, on train No. 2, J. C. Carlin conductor, at 10.30 a. m. Now, about the third station south of Nicholson this man (Jopes) got on the train. I never saw him before. The conductor went up to him to collect his fare and some dispute followed, he claiming that he did not pay any fare on that road. The conductor said to him, "Well, you can't ride with me unless you pay your fare." Finally he paid his fare, and the conductor gave him a due-pass or receipt for his money and then went forward. The brakeman then came into the car and was putting down the blinds on the side of the car this man was sitting, to keep the sun out. The fellow said to the brakeman, "Leave
42 this alone, I will attend to that; you get out of here," and the brakeman left. This man then got out & went forward, and at the next station a lady got on with some children, and the conductor came back to collect her fare, and this man followed him & stood right behind the door of the car and was watching him. I now mistrusted that there was something wrong. He stood there for quite awhile, behind the door on the platform, and looked around this way to see if the conductor was coming, while the conductor stood against the saloon of the car. The conductor passed out by him. What they said there I do not know; there was something said that I could not hear. I then went up to get a drink of water and I saw that the man had a dirk-knife 6 or 8 inches long, which he slip- up his sleeve, and he said, "I will be even with that fellow." I said nothing to the man, because it was not my mix. He then went into the forward car, and as we were coming to Nicholson Sta. I stepped to the door so I could look through both cars to the baggage

car. The conductor and porter came out on the platform of the car, and as the train stopped at Nicholson this man went out on the platform, and the next thing I heard was the report of a pistol. I saw this man get down off the platform on the ground and take his coat off and grasp hold of his arm, from which the
43 blood was running. His coat was on fire, and we supposed they were standing so close together that the pistol had set fire to his coat, and some man stepped on the burning place and put the fire out. This same man then said to the conductor, "I will be even with you yet for this," and the conductor said to him, "I do not want any more trouble with you, sir," and we got away from that place just as quick as we could, because it was getting pretty warm about there. The man dropped the knife during the affray and the conductor picked it up & brought it in. I saw it & knew that it was the identical knife I had seen the man shove up his sleeve. It is my impression that the man had been drinking, but I could not be positive as to that. He acted very mean.

(Signed) PERRY ROGERS,
W. Jefferson, O.

Is working for P. C. & St. L. R. R. Co.; had been to New Orleans on business for his company.

It is agreed, the deposition being mislaid, that the foregoing may be read as the deposition of Perry Rogers for defendant, on the trial of said cause, subject to objection for competency or relevancy of evidence only.

CALHOUN & GREEN, *P. Q.*
FEWELL, *P. D.*

Filed Jan'y 4th, 1888.

JAS. M. McKEE, *Clerk*,
P'r R. H. WINTER, *D. C.*

44 The defendant then introduced J. C. CARLIN, who, being duly sworn, testified as follows:

My name is John C. Carlin, and I am thirty-two years of age and I reside in the State of Texas. I was raised partly in Mississippi & partly in Texas. I had been conductor on defendant's railroad for some time before the happening of the matters to which this lawsuit refers, but have had no connection with the defendant, as employee or otherwise, since the 24th of July, 1886. I had left New Orleans at 10.30 a. m., as conductor of a regular passenger train going to Meridian, Miss. When we reached Pearl River station the plaintiff, Mr. Jopes, got aboard. After the train had started I went into the lady's coach to take up tickets. When I reached Mr. Jopes he said he had never paid any fare on that road and was not going to pay any. I said he would have to pay or get off the train at the next station. He thereupon said: "I will pay it and get even with you." The fare was eighty-five cents to Derby, where he said he was going, and he handed me a two-dollar bill, and I gave him one dollar & fif-

teen cents in change and a receipt for the eighty-five cents. He made some references to my having carried a Mrs. Ferrell to Meridian & back free, and I told him he was mistaken. He was drinking, as I thought, and disposed to be boisterous, swearing, &c. I went away from him and do not remember that I slapped him on the back. He came forward into the smoker, and, looking back from the baggage car,
45 where I was, I saw him slip a knife up his sle-ve. I remarked to the baggage-master that I was going to have some trouble with that man, and went into my valise and got my pistol and put it in my pocket. When the train reached Nicholson I went out on the rear platform of the baggage car, and as I passed out Jopes was standing on the front platform of the smoker with his knife in his right hand up his sle-ve. My porter coughed to attract my attention and when I looked at him he pointed to the knife. I went down the steps of the baggage coach and turned to walk forward towards the baggage car door, and was walking towards it when, looking back over my shoulder, I saw Jopes on the depot platform advance on me with his knife in his right hand, on which depot platform he had crept up on me four or five steps, and was within four feet of me when I looked around. The knife was open. I turned and drew my pistol and opened fire on him, firing three or four shots at him as rapidly as I could. He backed back on the depot platform and pulled up by the hand-rail onto platform of the car and went into the car. I followed him into the car and told him to give me that knife, and he gave it to me and left. This is the knife (here the witness identified the knife, viz., the same one described in the testimony of Jopes). I have had this knife ever since. Jopes
46 was three or four feet from me when I shot him—near enough to spring on me. I considered that I was in imminent danger from him with his knife open & advancing on me. Jopes said I had killed him for nothing, and to this I made no reply. I used none of the insulting language to Jopes or about Jopes that has been testified to. When Jopes asked me on the platform what I had shot him for I made no answer. I have not been in the defendant's employment since that day and have had no connection with the defendant since. I now live and am railroading in Texas. The train was going north and the depot at Nicholson was on the west side of the track.

The defendant next introduced THOMAS J. WALKER, who, being duly sworn, testified as follows:

"On the 24th of July, 1886, I was on the train of defendant's road coming from New Orleans going North. I did not know Mr. Jopes and did not notice him until the train was about to stop at Nicholson station, when I started to go out of the front end of the smoking car, but saw there Mr. Jopes and two or three other men. I thought Mr. Jopes, from his manner, was either mad or intoxicated, though he said nothing. I smelt whiskey which I thought was on Jopes,
but I could not swear to this, as it might have been on one of
47 the other men. I could not swear that Mr. Jopes was intoxicated. I turned & went back to the rear end of the car and got

off there and started along the depot platform. When I had come about half the length of the car I had got out of on the depot platform, Mr. Carlin, the conductor, commenced firing at some one who was on the front car platform of that same car, whom I could not see. I saw the conductor very plainly firing, and he was shooting between the rear end of the baggage car and the front end of the smoker, and I could not see who he was shooting at. He fired several shots. He ran up on the platform, saying, 'Drop that knife.' Jopes immediately came out of the rear end of the smoking car onto the depot platform, and his coat was on fire. Jopes pulled off his coat and dropped it on the depot platform and some one put out the fire by stamping on it."

GEORGE W. STOCKSTILL, sworn on the part of defendant, testified:

"I live at Nicholson; have known plaintiff for twenty-five years. He was sometimes drunk, but not oftener than drinking men ordinarily are."

Defendant's attorney asked witness whether he knew Jopes' character for peace or violence, with a view to proving that Jopes
48 was a man of violent and dangerous character; to which counsel for plaintiff objected. The court said he would admit the testimony if knowledge of such reputation could be brought home to Carlin the conductor. Defendant's counsel stated that he could not prove such knowledge, and reminded the court that Carlin has testified that he did not know Jopes; whereupon the court refused to allow the testimony; to which ruling the defendant excepted.

The court instructed the jury that if the evidence showed that the plaintiff was a passenger on the train and that he was shot and wounded by the conductor whilst he was such passenger and whilst prosecuting his journey, and such shooting was not a necessary self-defense, the plaintiff was entitled to recover compensatory damages; but if the jury believe the plaintiff, when shot, was advancing on the conductor or making hostile demonstrations towards him with a knife in such a manner as to put the conductor in imminent danger of his life or of great bodily harm, and that the conductor shot plaintiff to protect himself, the plaintiff was not entitled to recover; but if it appeared that the conductor shot the plaintiff, whilst such passenger & prosecuting his journey, wantonly & without any provocation at the time, then the jury might award exemplary damages.

49 Responding to the request of defendant that the court should instruct the jury that if they believed from the evidence that when Carlin shot the plaintiff he, Carlin, had reasonable cause to believe, from Jopes' manner and attitude, that he, Jopes, was about to assault Carlin with the knife, and that it was necessary to shoot him to prevent great bodily harm from Jopes, then that the jury should find for defendant, whether Jopes was intending to do Carlin great bodily harm or not, the court declined to instruct, but instructed that, in that state of the case, if Carlin shot under the mistaken belief from Jopes' actions that he was in

danger of great bodily harm then about to be done him by Jopes when in fact Jopes was not designing or intentionally acting so as to indicate such design, the plaintiff should be entitled to compensatory damages and not punitive damages; to which defendant excepted.

Witness my hand & seal this 16th day of May, 1888.

R. A. HILL, *Judge.* [SEAL.]

The defendant made a motion for a new trial, in the following words:

In the Circuit Court of the United States for the Southern District of Mississippi.

JOSEPH H. S. JOPES
vs.
THE NEW ORLEANS & NORTHEASTERN RAILROAD CO. } # 3462.

50 And now comes the defendant and moves the court to set aside the verdict herein rendered and to grant the defendant a new trial herein, for the following reasons:

1. The damages are excessive.

2d. The verdict is contrary to the law & the evidence.

3. The court erred in admitting the testimony as to what the conductor, Carlin, said on the depot platform after the shooting was over, and also as to what the plaintiff said to the conductor on the platform after the shooting was over, & of the conductor's reply at that time as to what Jopes said.

4th. The court erred in ruling that the defendant could not introduce testimony as to the violent character of the plaintiff without proof of the knowledge of the conductor as to such character.

5th. The court erred in instructing the jury that the defendant was liable, under the facts and circumstances, for the act & conduct of the conductor.

6th. The court erred in refusing the request of the defendant to charge the jury that if the conductor had reasonable grounds to believe, from the actions and attitude of the plaintiff, that he, the conductor, was in imminent danger of serious injury at the hands of the plaintiff, and, so believing, that the plaintiff, in order to pre-
51 vent such injury —, that the defendant could not recover and in modifying such instruction so as to limit the recovery in such case to compensatory damages.

JOHN W. FEWELL,
For Motion.

Filed May 16th, 1888.

JAS. M. McKEE, *Clerk,*
P'r R. H. WINTER, *D. C.*

And the court having on a later day of the term overruled said motion, the defendant in open court excepted to the judgment of the court in overruling said motion, and then & there in open co

tendered this its bill of exceptions, which is signed & sealed and made part of the record in said cause.

R. A. HILL, *Judge.* [SEAL.]

We agree that the foregoing is a correct bill of exceptions.

CALHOUN & GREEN,
For P'ff.

Filed May 16th, 1888.

JAS. M. McKEE, *Clerk,*
P'r R. H. WINTER, *D. C.*

52 In the Circuit Court of the United States for the Southern District of Mississippi.

JOSEPH H. S. JOPES
vs. } 3462.
N. O. & N. E. R. R. Co.

The defendant having sued out a writ of error to the Supreme Court of the United States and having applied for a supersedias bond, the amount of *of* such bond is hereby fixed at the amount of the judgment, with twenty-five per cent. of the amount thereof added thereto.

Minute Book 6, page 128. May term, 1888. 26th d'y of May, 1888.

53 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Mississippi, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Joseph H. S. Jopes and the New Orleans & Northeastern Railroad Company, a manifest error hath happened, to the great damage of the said The New Orleans & Northeastern Railroad Company, as as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court
54 may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

danger of great bodily harm then about to be done him by Jopes when in fact Jopes was not designing or intentionally acting so as to indicate such design, the plaintiff should be entitled to compensatory damages and not punitive damages; to which defendant excepted.

Witness my hand & seal this 16th day of May, 1888.

R. A. HILL, *Judge.* [SEAL.]

The defendant made a motion for a new trial, in the following words:

In the Circuit Court of the United States for the Southern District of Mississippi.

JOSEPH H. S. JOPES
vs.
THE NEW ORLEANS & NORTHEASTERN RAILROAD CO. } # 3462.

50 And now comes the defendant and moves the court to set aside the verdict herein rendered and to grant the defendant a new trial herein, for the following reasons:

1. The damages are excessive.

2d. The verdict is contrary to the law & the evidence.

3. The court erred in admitting the testimony as to what the conductor, Carlin, said on the depot platform after the shooting was over, and also as to what the plaintiff said to the conductor on the platform after the shooting was over, & of the conductor's reply at that time as to what Jopes said.

4th. The court erred in ruling that the defendant could not introduce testimony as to the violent character of the plaintiff without proof of the knowledge of the conductor as to such character.

5th. The court erred in instructing the jury that the defendant was liable, under the facts and circumstances, for the act & conduct of the conductor.

6th. The court erred in refusing the request of the defendant to charge the jury that if the conductor had reasonable grounds to believe, from the actions and attitude of the plaintiff, that he, the conductor, was in imminent danger of serious injury at the hands of the plaintiff, and, so believing, that the plaintiff, in order to pre-
51 vent such injury —, that the defendant could not recover and in modifying such instruction so as to limit the recovery in such case to compensatory damages.

JOHN W. FEWELL,
For Motion.

Filed May 16th, 1888.

JAS. M. McKEE, *Clerk,*
P'r R. H. WINTER, *D. C.*

And the court having on a later day of the term overruled said motion, the defendant in open court excepted to the judgment of the court in overruling said motion, and then & there in open co

tendered this its bill of exceptions, which is signed & sealed and made part of the record in said cause.

R. A. HILL, *Judge.* [SEAL.]

We agree that the foregoing is a correct bill of exceptions.

CALHOUN & GREEN,
For P'ff.

Filed May 16th, 1888.

JAS. M. McKEE, *Clerk,*
P'r R. H. WINTER, *D. C.*

52 In the Circuit Court of the United States for the Southern District of Mississippi.

JOSEPH H. S. JOPES
vs.
N. O. & N. E. R. R. Co. } 3462.

The defendant having sued out a writ of error to the Supreme Court of the United States and having applied for a supersedias bond, the amount of *of* such bond is hereby fixed at the amount of the judgment, with twenty-five per cent. of the amount thereof added thereto.

Minute Book 6, page 128. May term, 1888. 26th d'y of May, 1888.

53 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Mississippi, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Joseph H. S. Jopes and the New Orleans & Northeastern Railroad Company, a manifest error hath happened, to the great damage of the said The New Orleans & Northeastern Railroad Company, as as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court
54 may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Sam'l F. Miller, acting Chief Justice of the said Supreme Court, the 26th day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

[Seal U. S. Circuit Court, Southern District of Mississippi.]

JAMES M. McKEE,
Clerk of the Circuit Court of the United States
for the Southern District of Mississippi,
By R. H. WINTER, *D. C.*

[Endorsed:] 3462. Jos. H. S. Jopes *vs.* N. O. & N. E. R. R. Co. Writ of error. Filed 26 M'y, 1888. Jas. M. McKee, cl'k, per R. H. Winter, D. C.

55 *Bond.*

UNITED STATES OF AMERICA, }
Southern District of Mississippi, } *ss:*

Know all men by these presents that we, The New Orleans and Northeastern Railroad Company, principal, and John W. Fewell & John Kemper, sureties, are held and firmly bound unto Joseph H. S. Jopes in the sum of eleven thousand eight hundred and seventy-five dollars ($11,875.00), for payment whereof we bind ourselves, our successors, heirs, executors, and administrators, firmly by these presents this 15th day of June, eighteen hundred & eighty-eight.

The condition of this obligation is that whereas on the 15th day of May, 1888, in the circuit court of the United States for the southern district of Mississippi, the said Joseph H. S. Jopes recovered from the said New Orleans & Northeastern Railroad Company a judgment for the sum of nine thousand five hundred dollars & costs of suit, damages in a certain action of trespass in said court; and whereas the said The New Orleans & Northeastern Railroad Company hath sued out a writ of error from said judgment to the Supreme Court of the United States and hath obtained a supersideas:

Now, if the said The New Orleans & Northeastern Railroad Company shall prosecute its said writ of error to effect and if it fails to make its plea good shall answer all damages & costs, then this obligation to be void; otherwise it shall remain in full force & virtue.

56 Witness the signature of the president of said railroad company and of its secretary, and witness also the seal of said company affixed by the said secretary, its custodian by authority of said company, and witness also the signatures and seals of said sureties this day and date first above written.

[Seal New Orleans & Northeastern R. R. Co.]

C. SNEFF, *President.*
JNO. GLYNN, JR., *Secretary.*
JOHN W. FEWELL. [SEAL.]
JOHN KEMPER. [SEAL.]

UNITED STATES OF AMERICA,
Southern District of Mississippi:

I, R. A. Hill, judge of the circuit court & for said district, hereby approve the foregoing bond and surety and order the writ of supersedeas to issue in said cause this 20th day of June, 1888.

R. A. HILL, *Judge.*

STATE OF MISSISSIPPI, *Jones County:*

Personally came before me, the undersigned justice of the peace in & for the county & State aforesaid, John Kemper, who, being by me duly sworn, deposes & says he is the owner of property in the State aforesaid subject to levy & sale under execution to the value of ten thousand dollars over & above all debts and liabilities and over & above exemptions allowed by law.

JOHN KEMPER.

Subscribed & sworn to before me this 15th day of June, 1888.

JNO. C. BYRD, [SEAL.]
Mayor & ex Officio Justice of the Peace.

57 United States of America to Joseph J. S. Jopes:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2nd Monday of October, 1888, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Mississippi, wherein The New Orleans & Northeastern Railroad Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said suit of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, Chief Justice of the said Supreme Court of the United States, this 18th day of June, in the year of our Lord eighteen hundred & eighty-eight.

R. A. HILL, *Judge.*

UNITED STATES OF AMERICA,
Southern District of Mississippi:

Before me, the undersigned clerk of the circuit court of the United States in and for the district aforesaid, — Samuel Livingston, who, being first duly sworn, deposes and says he did, on the 23d day of June, A. D. eighteen hundred and eighty-eight, at the request of the counsel of the plaintiff in error in the case of The New Orleans & Northeastern Railroad Company against Joseph H. S. Jopes, lately tried in said court, serve the foregoing citation on Messrs. Calhoun & Green, attorneys of record of said Joseph H. S. Jopes, by handing to them a true copy of the said citation.

[Seal U. S. Circuit Court, Southern District of Mississippi.]

SAMUEL LIVINGSTON.

Sworn to and subscribed before me this 23d day of June, 1888.

JAMES M. McKEE, *Clk,*
Per R. H. WINTER, *D. C.*

[Endorsed:] 3462. J. H. S. Jopes *vs.* N. O. & N. E. R. R. Co. Citation to Calhoun & Green. Filed June 23, 1888. Jas. M. McKee, cl'k, per R. H. Winter, D. C.

58 I, James M. McKee, clerk of the circuit court of the United States for the southern district of Mississippi, do hereby certify that the annexed and foregoing fifty-seven pages contain a true & complete transcript of all the papers & proceedings on file or of record in said court in the above-stated cause.

Given under my hand & seal of said circuit court, at Jackson, Miss., this August 8th, 1888.

[Seal U. S. Circuit Court, Southern District of Mississippi.]

JAS. M. McKEE, *Clerk*,
Per R. H. WINTER, *D. C.*

59 Supreme Court of the United States, of the October Term, A. D. eighteen hundred & eighty-eight.

THE NEW ORLEANS & NORTHEASTERN RAILROAD CO.

vs.

JOSEPH H. S. JOPES.

In error.

Afterwards, to wit, on the 2d Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said The New Orleans & Northeastern Railroad Company, by Edward Colston and Jno. W. Fewell, its attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. The court below erred in overruling the objection of the plaintiff in error to the testimony of the witnesses, E. B. Walker and Chas. H. Ferrell, in relation to what the conductor, Carlin, said to one Willis after the shooting was over and the difficulty ended, and in permitting said witnesses to testify, over said objection, that Carlin said to Willis after the shooting was over and the difficulty was ended: "I (*i. e.*, he, Carlin,) shot the d——n son of a bitch."

60 2. The court below erred in not permitting the plaintiff in error to prove by Geo. W. Stockstill, a witness of plaintiff in error, that Jopes, the plaintiff below, was a man of violent and dangerous character.

3. The court below erred in refusing the charge asked by the plaintiff in error, as requested, and in modifying the same as shown by the bill of exceptions.

4. The court below erred in overruling the plaintiff's (in error) motion for a new trial.

And there is also error in this, that by the record aforesaid it appears that the judgment aforesaid given was given for the said Joseph H. S. Jopes against the said The New Orleans & Northeastern Railroad Co.; whereas, by the law of the land, the said judgment

ought to have been given for the said The New Orleans & Northeastern Railroad Company and against the said Joseph H. S. Jopes; and the said The New Orleans and Northeastern Railroad Company prays that the judgment aforesaid may be reversed,
61 annulled, and altogether held for nothing, and that it may be restored in all things which it has lost by occasion of the said judgment, &c.

EDWARD COLSTON,
of Cincinnati, O.,
JNO. W. FEWELL,
of Meridian, Miss.,
Att'n'ys for Plaintiff in Error.

[Endorsed:] The New Orleans & Northeastern R. R. Co., pl't'ffs in error, *v.* Joseph H. S. Jopes, def't in error. Assignment of errors. Filed —— day of Sept., 1888.

Endorsed on cover: S. Mississippi C. C. U. S. No. 1110. The New Orleans & Northeastern Railroad Company, plaintiff in error, *vs.* Joseph H. S. Jopes. Filed September 18, 1888.

Office Supreme Court U. S.
FILED,
OCT 19 1891
JAMES H. MCKENNEY,
CLERK.

Robert Clarke & Co., Printers. [*October, 1891.*

Supreme Court of United States.

The New Orleans and North-Eastern Railroad Company,

Plaintiff in Error,

No. 104.] *vs.*

Joseph H. S. Jopes,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD COLSTON,
JOHN W. FEWELL,
Counsel for Plaintiff in Error.

Robert Clarke & Co., Printers. | *October, 1891.*

Supreme Court of United States.

The New Orleans and North-Eastern Railroad Company,

Plaintiff in Error.

No. 104.] *vs.*

Joseph H. S. Jopes.

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

The New Orleans and North-Eastern Railroad Company prosecutes this writ of error to reverse a judgment against it of the Circuit Court of United States for the Southern District of Mississippi for $9,500, in favor of the defendant in error, Joseph H. S. Jopes, in an action brought by said Jopes against said company, for thirty thousand dollars damages, in the Circuit Court of Hancock County, in the State of Mississippi, and removed thence by the plaintiff in error to the United States Court.

STATEMENT OF CASE.

On the 24th of July, 1886, the New Orleans and North-Eastern Railroad Company owned and operated a line of road from New Orleans, Louisiana, to Meridian, in the State of Mississippi, as a common carrier of passen-

gers. On the day named, Jopes became a passenger from Pearl River Station, on said road, on one of the company's regular northbound passenger trains, intending to go to Derby, a station further north on the same road.

When the train stopped at Nicholson, an intermediate station, the conductor, acting as we claim under circumstances justifying the attack, shot Jopes in the body several times, inflicting dangerous wounds upon his person, for which injuries the suit was brought. The trial resulted in a verdict and judgment as above stated. That the wounds were inflicted by the conductor is undisputed. There is, however, a disagreement as to certain occurrences between Jopes and the conductor on the train and at the station.

When the conductor applied to Jopes for payment of fares, shortly after the train left Pearl River Station where Jopes boarded it, Jopes endeavored to avoid paying fare by claiming to the conductor that he rode free with other conductors on that line. This conductor, however, collected from Jopes the full cash fare from Pearl River Station to Derby, being eighty-five cents. This was paid by a two-dollar bill handed to the conductor, who returned the change to Jopes, Jopes demanding and receiving from the conductor a receipt for amount paid. After this Jopes charged the conductor with permitting persons not entitled to free transportation to ride on the company's passenger trains without charge. In making this statement to the conductor, Jopes says he had in mind the case of a certain Mrs. Ferrell, though he mentioned no name to the conductor. Jopes told the conductor he was going to report him to the company for permitting such persons to ride free. Jopes claims that all he said in reference to this matter was in a jocular way, and that it was so understood

by the conductor, and that he had no real intention of reporting the conductor to the company as threatened.

The conductor's account of this part of the transaction differs essentially from the account given by Jopes. The conductor says that Jopes, when asked to pay his fare, declined to do so, and said he never did pay fare on that road, and would not pay it then; that thereupon the conductor said he must pay the fare or get off the train at the next station. Jopes replied, "I will pay it and get even with you." The conductor says Jopes was boisterous and drunk.

The conductor says after this Jopes went into the smoking car, the next car forward. The conductor went into the baggage car of the train, and claims on looking back from there to have seen Jopes slip a knife up his sleeve. He thought this meant an attack on him by Jopes; he remarked to the baggage master that he was going to have trouble with that man, and he therefore took from his valise in the baggage car a pistol and put it in his pocket. When the train arrived at Nicholson the conductor went out of the baggage car by its rear or south end, and passed Jopes who was standing on the front or north platform of the next car with a knife in his right hand up his sleeve. The porter of the train coughed to attract the conductor's attention, and when he looked the porter pointed to the knife. The conductor proceeded down the steps of the baggage car and turned to walk forward on the railroad platform toward the middle or side door of the baggage car, and on looking over his shoulder he saw Jopes on the depot platform advancing upon him with the knife in his right hand, Jopes having already "crept up on" him four or five steps, and was within three or four feet of the conductor, near enough to spring on him when

the conductor looked around. The knife was open, and the conductor believing that he was in imminent danger from Jopes turned around and opened fire upon Jopes, shooting three or four times as rapidly as possible. (Record, marg. p. 45.)

The course of the train was north and the station was on the west.

Jopes admits that when the train approached Nicholson station he went out onto the forward platform of the smoking car with the open knife in his hand and stood there looking toward the station, "with that hand in which the knife was, on the railing of the car."

Perry Rogers, a passenger whose evidence was introduced on behalf of the company at the trial, testified that after the man Jopes had paid his fare and obtained the receipt of the conductor therefor, one of the brakemen came into the car and was putting down the blinds on the side on which Jopes sat; and that Jopes ordered him to get out, saying, that he would attend to that; that afterward Jopes went into the smoking car, and some women having gotten on the train at the station, the conductor came through the smoking car to the ladies' car to collect the fare, that Jopes followed the conductor from the smoking car back to the door of the ladies' car, and stood there behind the jamb, watching for the conductor to pass that way returning. The conductor returning passed Jopes on this platform. This witness, to get a closer view, went to the water cooler under pretense of getting a drink of water, and saw that the man had a knife up his sleeve and heard him say, "I will be even with that fellow," and then he saw him go into the smoking car as the train was coming to Nicholson.

The court charged the jury that the railroad company would be liable for the act of the conductor in shoot-

ing Jopes unless such shooting was in necessary self-defense, and that if the plaintiff was in fact advancing upon the conductor or making hostile demonstrations toward him with a knife in such manner as in fact would put the conductor in imminent danger of his life or great bodily harm, and the conductor shot the plaintiff to protect himself, the company was not liable; but refused to charge, as requested by the defendant, that if the conductor had *reasonable cause* to believe from Jopes' manner and attitude that Jopes was about to assault him with the knife, and that it was necessary to shoot Jopes, to prevent great bodily harm, the jury should find for the defendant. The refusal of the court to give this charge, and giving the instructions above stated, together with certain rulings on the evidence, constitute the errors principally relied upon.

SPECIFICATION OF ERRORS.

1. We claim that the court erred in its instructions to the jury, and in refusing to give instructions as requested by plaintiff in error.

The errors under this head consist: 1. In the fact that the court charged the jury in effect, that the company would be liable unless the shooting was a necessary measure of self-defense. 2. That unless Jopes *really* intended to kill Carlin or to do him grievous harm, the shooting could not be self-defense, even though the conductor had *reasonable cause to believe* from Jopes' manner and attitude that Jopes was about to assault him with a knife, and that it was necessary to shoot Jopes to prevent bodily harm.

2. The court erred in permitting the witness E. S. Walker to testify that at the close of the shooting, one Willis, came up and asked, "What's all this about," and

that Carlin answered, "I shot the ——— ——— ———." (See Record, top page 16, marginal page 33). And that the court also erred in permitting the witness Ferrill to testify that immediately after the shooting Willis came up and said, "What is this all about?" and Carlin said, "I have shot the ——— ——— ———." And further that after Jopes had gone into the front end of the car and through it, and had came out of the opposite door and down on to the depot platform, he said to Carlin, "You have killed me for nothing," and Carlin said, "That is all right," (See Record, top page 17, marginal page 35.)

3. That the court erred upon the trial in refusing to permit the company to prove by the witness Stockstill, who had known Jopes for 25 years, that Jopes was a man of a violent and dangerous character.

Errors not assigned in the writ of error, may be specified in the brief.

106 U. S. p. 428.

ARGUMENT.

1. For convenience we insert the entire charge to the the jury as given in the record, top page 23, side page 48. It is as follows:

"The court instructed the jury that if the evidence showed that the plaintiff was a passenger on the train and that he was shot and wounded by the conductor while he was such passenger, and whilst prosecuting his journey, and such shooting was not in necessary self-defense, the plaintiff was entitled to recover compensatory damages; but if the jury believe the plaintiff, when shot, was advancing on the conductor, or making hostile demonstrations toward him, with a knife in such a manner *as to put the conductor in imminent danger of his life, or of great bodily harm, and that*

the conductor shot the plaintiff to defend himself, the plaintiff was not entitled to recover: but if it appears that the conductor shot the plaintiff while such passenger and prosecuting his journey, wantonly and without any provocation at the time, then the jury may award exemplary damages. Responding to the request of the defendant that the court should instruct the jury that if they believed from the evidence that when Carlin shot the plaintiff, he, Carlin, had reasonable cause to believe, from Jopes' manner and attitude, that Jopes was about to assault him with a knife, and that it was necessary to shoot him to prevent great bodily harm from Jopes, then the jury should find for the defendant, whether Jopes was intending to do great bodily harm or not. The court declined to so instruct, but instructed that in that state of case, if Carlin shot under the mistaken belief from Jopes action that he was in danger of great bodily harm then about to be done him by Jopes, when *in fact* Jopes was not designing nor *intentionally* acting so as to indicate such design, plaintiff should be entitled to compensatory damages and not punitive damages; to which defendant excepted." (Italics ours.)

Carlin's evidence on this subject is as follows:

"I went down the steps of the baggage coach and turned to walk forward toward the baggage car door, and was walking toward it, when, looking back over my shoulder, I saw Jopes on the depot platform advancing on me with his knife in his right hand, on which depot platform he had crept up on me four or five steps and was within four feet of me when I looked around. The knife was open. I turned and drew my pistol and opened fire on him, firing three or four shots at him as rapidly as I could. . . . Jopes was three or four feet from me when I shot him; near enough to spring on me. I considered that I was in imminent danger from him with his knife open and advancing on me." (Record, marginal pages 45, 46.)

It will be observed that the court has here charged the

jury that to exempt the company from liability they must find that the shooting was in self-defense, and that the shooting would not be in self-defense unless it took place in consequence of the plaintiff's advancing upon the conductor in such a manner as to *actually* put him in imminent danger of life or of grievous harm, with *actual* intent to take his life or do him great bodily injury; and unless the conductor shot the plaintiff to prevent the accomplishof such harm.

Let us examine the correctness of these propositions.

A knife in the hands of an adversary can put the opponent in no danger unless there be both purpose and opportunity to inflict injury upon him therewith. Therefore, the instruction of the court that to constitute self-defense it was necessary for the jury to find that Carlin was in imminent danger of his life, or of great bodily harm, from an attack by Jopes, *carried with it* a direction to the jury not to regard the danger as imminent unless Jopes had *in fact* both the purpose and present means to deal *Carlin a blow with the knife*, and had done some act in execution of such design. Under this charge, in order to protect the company from liability, knowledge of his imminent danger on the part of Carlin became just as essential as the existence of such danger, since the charge required that the shooting should have been done upon *actual necessity* of avoiding imminent danger to life or bodily welfare, in order to be justifiable. Therefore, under this charge it became necessary not only that the jury should find there was a purpose on the part of Jopes to do great bodily harm to Carlin, but also to find that Carlin knew that such was the purpose of Jopes. How else could Carlin be aware of the necessity to shoot his assailant?

But the court prevented the company from bringing itself within even this harsh rule of law, by telling the jury that the company would not be exempt from liability even if Carlin did have reasonable cause to believe himself in imminent danger of great bodily harm, if, *in fact*, Jopes was not designing or *intentionally acting* so as to indicate such design. The court persistently refused to tell the jury what would constitute an *intentional acting*, or a *design in fact*. Who could tell what Jopes was *in fact* designing, or whether or not he intended that his action should receive the interpretation usually and reasonably placed upon conduct such as his?

The charge given amounted to this: that, though the manner and attitude of Jopes were such as to give the conductor reasonable cause for belief that he was about to be assaulted by Jopes with a knife, and that to prevent the apprehended assault shooting was necessary, the company would necessarily be liable for damages if there was a mistake in fact on the part of the conductor as to the purpose of Jopes, even though the belief upon which the conductor acted was one warranted by "Jopes's action." Or, to state it otherwise, even if the manner and attitude of Jopes were of such hostile and threatening nature as would cause belief in the mind of a reasonable man that a deadly assault was about to be committed, and that it was necessary to shoot the assailant in order to prevent great bodily harm, such belief, however well founded in appearance, would not be a defense unless well founded *in fact*. The belief of imminent danger of great bodily harm, warranted by all discernible facts, and honestly entertained, would not, according to the charge of the court, be a defense to the company. Granting, for argument sake, that the court was correct in charging that imminent danger

to the conductor would alone relieve this company from liability, yet the court erred in drawing the minds of the jury to the question whether Jopes did or did not have a different intent from that which his conduct exhibited. How could the design or intent of Jopes have been known save and except as he gave indications thereof by manner and action? These are the sole exponents of intent. The thought of man is not triable otherwise than by the outward manifestation which he himself supplies. The charge of the court was an invitation to the jury to attribute to Jopes an intent or motive contrary to the evidences of intent exhibited at the time by him.

As was well said by the Supreme Court of Massachusetts, in *Commonwealth* v. *White*, 110 Mass. p. 409:

"It is not the secret intent of the assaulting party, nor the undisclosed fact of his ability or inability to commit the battery that is material; but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action."

The conductor was the sole judge of whether he stood in the presence of imminent danger. Whether he judged correctly or incorrectly is immaterial, if his belief was such as any reasonable man, in the same circumstances, would have entertained. But the court refused to permit the case to go in that shape to the jury, but presented it to the jury in the erroneous form already stated.

We insist that imminent danger of great bodily harm does, in legal contemplation, exist *in fact* wherever there are sufficient indications to create the belief in the mind of a reasonable person that such danger is impending. We insist that the court ought to have modified the language in that part of its charge where it said: "If the

plaintiff was advancing on the conductor, or making hostile demonstrations toward him with a knife, in such manner as to put the conductor in imminent danger of his life or great bodily harm, and the conductor shot the plaintiff to defend himself, the plaintiff was not entitled to recover," so as to have made the jury understand that there was imminent danger, and that the shooting was necessary, if the action and manner of Jopes, at the time, were such as to make a reasonable man believe that it was necessary to shoot in order to avoid the infliction upon him of great bodily harm.

The rule prescribed by the court by which the liability of the defendant was to be determined in this case, is a more harsh and severe one than that by which the conductor would have been judged on an indictment for shooting Jopes with intent to kill, of which offense, by the way, he has been acquitted by a jury of the vicinage.

It is well settled that one may, in defending his person against unprovoked assaults or demonstrations threatening death or great bodily harm, slay the assailant without incurring criminal liability, where the slayer had reasonable ground for believing that his life or bodily welfare was in imminent danger, *even though it should afterward turn out that there was no design on the part of the deceased of taking life, or of inflicting great bodily harm.*

In the celebrated case of *Commonwealth* v. *Selfridge*, tried before the Supreme Judicial Court of Massachusetts, Parker, J., after stating three propositions applicable to the case, the last of which was as follows: "When from the nature of the attack there is reasonable ground of belief that there is a design to destroy his life, or commit any felony on his person, the killing of the assailant will be excusable homicide, although it should afterward appear

no fellony was intended," proceeded to elucidate this proposition in the following terms:

"To illustrate this principle, take the following case: A., in the peaceable pursuit of his affairs, sees B. rushing rapidly toward him with outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances, having approached near enough in the same attitude, A., who has a club in his hand, strikes B. over the head before or at the same instant the pistol is discharged, and of the wound B. dies. It turns out that the pistol was loaded with *powder* only, and the real design of B. was only to terrify A. Will any reasonable man say that A. is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such a doctrine, must require that a man so attacked must, before he strike the assailant, stop and ascertain how the pistol is loaded, a doctrine which would entirely take away the essential right of self-defense."

The justness of this rule would not be lessened by the fact that the assailant was one who had made previous threats to "get even." The judge who tried the case at bar would require Carlin not only to have stopped and ascertained whether the knife Jopes held had a keen, incisive blade, but also to have obtained a statement, if not an affidavit, from Jopes that he really intended to use the knife upon him. The principle laid down in the *Selfridge* case has been followed by many of the most respectable courts in the land, and is gainsaid by none that we know of.

In *Shorter* v. *The People*, 2 N. Y. 193, the Court of Appeals, by Bronson, J., said:

"When one who is without fault himself, is attacked by another in such a manner or under such circumstances as to furnish reasonable ground for apprehending a design to take away his life, or to do him some bodily harm, and

there is reasonable ground for believing the danger imminent that such design will be accomplished, we think he may safely act upon appearances and kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justifiable although it may afterward turn out that the appearances were false and there was *in fact* neither design to do him serious injury nor danger that it would be done. He must decide at his peril upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review, but he may act at the peril of making *that guilt* if appearances prove false, which would be excuse, did that prove true. I can not better illustrate my meaning than by taking the case put by Judge afterward Chief-Justice Parker of Massachusetts on the trial of Thomas O. Selfridge." (See page 197.)

In *Logue* v. *Commonwealth*, 38 Pa. St. 265, the prisoner's counsel had requested the trial judge to charge the jury that if the prisoner had reasonable cause to apprehend danger to his life, and if it appeared imminent, the homicide would be excusable. The trial court refused so to instruct the jury unless there was actual danger to the life of the prisoner not occasioned by resistance. The Supreme Court, Thompson, J., said:

"The learned judge thought the apprehension of imminent danger was not excuse. 'The danger must be actual.'

"Here, then, was a wide difference between the existence of the ground claimed as covered by the law of self-defense and that laid down by the court, namely, the difference between a reasonable apprehension of the danger of loss of life or limb arising from circumstances appearing to indicate such a design on the part of the assailant, which might in fact have been unreal; and that indorsed by the court, that nothing will excuse a homicide in self-defense but actual danger. It was of this last position that Parker,

J., said in the celebrated trial of Selfridge in Boston, in 1805, that such a 'rule would lay too heavy a burden on poor humanity.'" (See p. 267.)

And the court reversed the judgment of conviction for the refusal to give the charge requested.

Campbell v. *The People*, 16 Ill. 17, was an indictment for murder. The court charged the jury that if they believed from the evidence that defendant, being pursued by deceased, turned upon deceased and slew him with a knife or other instrument capable of producing death, when it was not necessary for self-protection, or in necessary self-defense, or to prevent his receiving great bodily harm, defendant would be guilty of manslaughter. The error complained of was predicated upon this instruction. Caton, J., delivering the opinion of the Supreme Court, said:

"This instruction, if not absolutely wrong, was at least liable to misconstruction, and to be understood by the jury as depriving the defendant of the right of self-defense, unless his danger was not only apparently imminent, but was real and positive. If so understood, the instruction was wrong. If the defendant was pursued and assaulted by the deceased in such a way as to induce in him a reasonable and well grounded belief that he was actually in danger of losing his life or suffering great bodily harm when acting under the influence of such reasonable apprehension, he was justified in defending himself whether the danger was real or only apparent. Actual and positive danger is not indispensable to justify self-defense. If one is assaulted with a sword in such a way as to indicate an intent to take his life and with apparent ability to accomplish such intent, he is not bound to stop and inquire whether the sword is but a lath, or whether the assault is but a jest before he repels it with the necessary force to protect himself against the threatened harm. Or, if one is assaulted with a pistol in such a way as to manifestly show

design to slay him he may be justified in killing his assailant, although it should turn out the pistol was not loaded and the only design was to frighten him. Men, when threatened with danger, are obliged to judge from appearances, and determine from the actual state of things, from the circumstances surrounding them, at least as much as if placed in other and less exciting positions; and it would be monstrous to say that if they act from real and honest convictions, induced by reasonable evidence, they would be held responsible criminally for a mistake in the extent of the actual danger, where other reasonable and judicious men would have been alike mistaken. A contrary rule would make the law of self-defense a snare and delusion. It would become but a mockery of the sacred right of self-preservation." (See p. 19.)

By the Revised Code of Mississippi (1880), sec. 2878, homicide is made justifiable when committed in the lawful defense of the person *where there shall be reasonable ground to apprehend* a design to do some great personal injury, and there shall be imminent danger of such design being accomplished.

In *Dyson* v. *State of Mississippi*, 26 Miss. 362, the Court of Appeals of Mississippi said of this statute, or of one just like it:

"The only modification of the common law made by this statute consists in the justification extended to the accused when there shall be reasonable ground to apprehend a danger to commit a felony, or to do some great personal injury, instead of the *old rule* requiring actual danger at the time." (See p. 387.)

Thus it appears that in the state where this shooting occurred, the *old rule* has been abolished by statute, and that *reasonable* ground for belief in the existence of im-

minent danger is a justification even for taking the life of an assailant.

We cite the following additional authorities, stating the law in like terms:

State v. *Harris*, 1 Jones Law (N. C.) 194.
Rapp v. *Commonwealth*, 14 B. Mon. 501.
Meredith v. *Commonwealth*, 18 Id. 54, at bottom.
Merts v. *State*, 26 Ohio St. 167.
Erwin v. *State*; 29 Ohio St. 292 *et seq.*
Thompson on Trials, § 2160.

These authorities prove that the sacred right of self preservation, as it is called, justifies or excuses, as the case may be, even homicide where there is *reasonable ground to believe* that danger to life or body is imminent, and that it is necessary to kill or maim the assailant to prevent its accomplishment. They show that *mistaken* belief, as to the intent of the assailant to carry out the deadly assault, will not make *that guilt which would have been excuse* if appearances had proven true. It is safe to conclude that on the trial of Carlin for maliciously shooting Jopes with intent to kill, an instruction to the jury such as was given in the case at bar would have been error, requiring reversal of a conviction. Such an instruction, given in a civil action brought by Jopes against Carlin for damages for this assault, would also require a reversal of any judgment against him. The plea of self defense is not limited in its efficacy to exemption from accountability in criminal proceedings. The right must necessarily be absolute. Self-defense exempts him, who exercises it, from accountability of every kind. *Son assault demesne* has ever been a good answer to a civil suit for damages for a battery.

3 Bl. Com. 121.
Morris v. *Platt*, 31 Conn. 83.

If, instead of suing Carlin, who committed the assault, suit be brought, as in this case, against the company to make it liable, the principles above stated would likewise apply. Any defense available to Carlin is available to defendant in this action.

While it is clear that a passenger on a railroad train, who, with open knife, makes hostile demonstration upon the conductor, in manner and attitude indicating to a reasonable man that there is imminent peril, and that to escape bodily injury it is necessary to shoot the assailant, is himself the author of whatever injury he may sustain, by such shooting, yet we go further, and claim that in cases of assault upon passengers, the railroad company has a better defense than the servant who committed the assault would have if proceeded against either in a civil or criminal prosecution. The liability of the carrier to a passenger, for assaults committed by its servants, entrusted with the transportation of such passenger, being based upon breach of contract for carriage, if the passenger, in his intercourse with the servant, does acts tending naturally to invite violence from the servant, he has no right to hold the carrier liable for consequent injuries, even though the acts of the passenger did not amount technically to an assault nor constitute imminent danger of life or to bodily welfare. The obligation resting upon the passenger to observe ordinary propriety in his dealings with the servants of the carrier is as strong as any duty the carrier owes to the passenger. In such a case the passenger may have remedy against the servant in a civil or criminal proceeding or both, but with this he must be content. This is strongly and picturesquely put by the Chief Justice of Georgia in *Peavy* v. *The Georgia Railroad and Banking Company*, 81 Ga. 485, an action for damages by a passenger, on account of his ex-

pulsion from the cars and of the shooting of him by the conductor. The facts as stated in the opinion are as follows: "The plaintiff, with several drinks in his bosom, and a pistol in his possession got upon a passenger train. The first thing he did upon reaching the platform was to use profane language. The conductor being near by and hearing him, approached and either took him by the collar or touched him on the shoulder and admonished him not to swear. They had some conversation, and the plaintiff, with the conductor's assent, went into the car and took a seat. While there the conductor came in for the purpose of collecting fares or taking tickets, the conversation between them was renewed, in which the plaintiff again cursed and used obscene language. According to the weight of the testimony (to any one not under the sway of interest or the spell of eloquence) it is plain what the truth of the case is. He was profane, obscene and disorderly, and upon the conductor's threatening to put him off the train he drew a pistol. He had already stated that if the conductor attempted to put him off they would see which one 'was ditched first.' The conductor retired, borrowed a pistol from a passenger (a sheriff on board who had a prisoner in charge), and then came up and presented his pistol forcing the plaintiff to lower his hand, and backed him off the train. When the plaintiff reached the ground the conductor shook his pistol in his face, and told him if he got on the train any more he would get hurt.

"If nothing else had occurred there would have been no shooting. The conductor, up to this point, was unquestionably justified in what he did, but the plaintiff, after being expelled from the train, and being thus admonished by the conductor, replied with grossly vituperative obscenity and profanity. His expression, as he repeats it

himself in the evidence, is too repulsive to be reproduced in this opinion. The moment he gave this filthy insult the conductor shot him, hitting him in the shoulder, and about the same time plaintiff shot at the conductor, and they exchanged five shots, the conductor hitting three times and not being hit at all." (See pages 486–7.) The chief-justice further said, page 487:

"Did he have a cause of action for the shooting? But for his fault the conductor would not have been brought into the state of excitement from danger and insult which unfitted him for discharging his proper duties either to the company or to the passenger. Whether the conductor was more or less in fault than the plaintiff was in the shooting, certainly the plaintiff was more in fault than the company, because the plaintiff was there upon the ground, stirring up the excitement and bringing on danger both to the conductor and himself. He unfitted the conductor for exercising the care and prudence that were essential to guarding the interest of the company, and essential to performing in a proper manner his duty to the company or to the plaintiff. The plaintiff spoiled the instrument, and then sued the manager because the performer did not make good music. It was the plaintiff's fault that the conductor was out of tune. And although the conductor may not be altogether excusable for the shooting, the company was in no fault for it."

This case was followed in *Harrison* v. *Fink*, 42 Fed. Rep. 787.

It ought to require no argument to show that if a passenger by his own imprudent conduct excites the carrier's servant to commit an assault upon him, he should bear the consequences of his own misconduct.

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2. The second assignment of error calls in question the correctness of the ruling of the court in permitting

the witness E. P. Walker (Record, marginal page 33), and the witness Charles H. Ferrill (Record, marginal page 35), to testify that Carlin, the conductor, said, "I shot the —— —— ——," in replying to a question put by Mr. Willis, who asked, "What's all this about?" The witness Ferrill gives the reply of Carlin to the question put by Willis as being "I have shot the —— —— —— damned rascal." This very coarse language, introduced in evidence, was calculated to excite the prejudice of the jury against the defendant, who were told by the court that if the assault was wanton and willful the defendant was liable for punitive damages. If the ruling was erroneous, the error was clearly prejudicial.

Was the evidence admissible? We claim it was not, for the reason that it was the declaration of a third person, and the mere narration of a past transaction. The statement does not pretend, in any manner, to be an explanation of the shooting. It does not pretend to give any reason or motive for the act of the conductor.

The remarks attributed to the conductor could give to the transaction no color or aspect material to the issue. That the conductor thought Jopes was deserving of these foul epithets was not assigned as a reason for shooting him, and could have no proper bearing upon the right of Jopes to recover. The act of shooting was not denied in the evidence, and the introduction into the case of this coarse language was simply intended to inflame the minds of the jury. It is to be borne in mind this language was not addressed to the plaintiff, nor was it used in his hearing.

Let us get an accurate idea of the time and place when and where this language was employed by the conductor. The witness E. S. Walker, when the train

stopped at the station, was sitting on the front steps of Willis's store, "about forty yards from where the smoking car stopped." He describes seeing a man he supposed to be the conductor get off the *front* end of the baggage car, *the next to the engine*, and walk down the depot platform, *north* (which was the wrong direction), toward the *rear* end of the train. He further says that Jopes came out the *rear* end of the smoking car. If the conductor came out of the *front* end of the baggage car, and Jopes came out of the *rear* end of the smoking car, they would be the distance apart of at least two cars, and if Carlin was going north he would never have reached Jopes. But no matter; Jopes stood on the car platform with his hand on the railing, and he was standing still, this witness says, when the conductor came by within a few feet of him, walking on the depot platform, and commenced firing. He shot at him four times very rapidly, "*he saying nothing to Jopes, and Jopes saying nothing to him* that I could hear." The witness continues: "Jopes retreated into the door of the car, on the platform of which he was standing, and Carlin, the conductor, followed him into the car, when some one, whom I took to be one of the trainmen, caught Carlin by the arm. Jopes went through the car into which he had retreated, and came out of the other end of it onto the depot platform." (Record, marginal pages 32, 33.) The witness adds: "*Just at the close of the shooting* Willis came up and asked, 'What's all this about?' and Carlin answered, 'I have shot the d—— s—— of a b——.'"

This conversation between Willis and Carlin must not be confounded with the conversation found at this part of the record as taking place between Carlin and Jopes, after the latter had been shot, and had retreated into and through the car. The account of the conversation between Carlin

and Willis, given by the witness, Ferrill, differs, as already stated, as to the character of the language used, and Ferrill says it occurred "immediately" after the shooting. (Record, marginal page 35.) Willis was not called as a witness. So far, therefore, as regards the time at which this conversation occurred with reference to the shooting transaction, we find that one witness says it was "just at the close of the shooting," and the other says it was "immediately" after the shooting. The record discloses that the judge added to the bill of exceptions that "the proof showed that the remarks made between the plaintiff and Carlin took place immediately after the shooting." But we are not talking about those remarks, but about the remarks between Willis and Carlin. The witness Segerest, testified by deposition that he was sitting on "the store gallery of Willis Bros. when the shooting commenced. (Record, marginal page 31, answer to 5th X-Inf.) This is the porch from the steps of which E. S. Walker (Guenea Walker) saw the shooting. Segerest says: "When the last shot was fired Jopes had retreated back inside the car and the conductor rushed inside after him." (Record, marginal page 30, at top.) It will be remembered that at this point "one of the trainmen caught Carlin by the arm and Jopes went through the car into which he had retreated, and came out the other end." Here then the parties to the affray separated, Jopes continuing on through the car and the conductor returning, by the door at which he had entered, to the depot platform. After this Willis came up and the conversation in question between him and Carlin took place, evidently on the depot platform. It does not appear where Jopes was when the conversation in question took place between Willis and Carlin. It is not claimed that the words were uttered by

Carlin during the shooting, for while that was doing nothing was said. (Record, marginal page 32.) These words, therefore, did not accompany the act constituting the cause of action; nor did they, as already observed, serve to illustrate that act. They were a mere narrative of a past event with a bit of abuse thrown in. The fact that they were uttered "just at the close" of the affray, but after the parties had separated, or "immediately" after it, does not make the evidence competent. What appreciable time elapsed between the shooting and the statement is not disclosed. All we know is that it was *after*—although soon after. But it was *not while the work was going on.*

The best considered cases support our contention that this evidence was inadmissible. In *Vicksburg & Meridian Railroad* v. *O'Brien*, 119 U. S., p. 99, the question was fully considered by this court. It was there held that the declaration of a locomotive engineer as to the rate of speed at which the locomotive was going, made between ten and thirty minutes after the accident was not admissible. The court, speaking of such statement, said:

"It is not to be deemed part of the *res gestae*, simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer *was not in the act of doing any thing that could possibly affect it.* If his declaration had been made the next day after the accident, it would scarcely be claimed that it was admissible evidence against the company. And yet the circumstances that it was made between ten and thirty minutes—an appreciable period of time—after the accident, can not upon principle make this case an exception to the general rule. If the contrary view should be maintained, it would follow that the declaration of the engineer, if favorable to the com-

pany would have been admissible in its behalf as part of the *res gestae* without calling him as a witness—a proposition that will find no support in the law of evidence. The cases have gone far enough in the admission of the subsequent declaration of agents as evidence against their principals." (See p. 106.)

If the interval of ten minutes is not close enough to make the evidence admissible, should five minutes be regarded as sufficient? If five minutes is not sufficient, then how near in minutes must it be? The proper rule is *dum ferret opus*. If it is *after* the transaction has closed, it can not be, in the nature of things, part of the *res gestae*. It makes no difference that it is "just at the close," or "immediately" after. If it is *after*, the evidence is inadmissible. "It is not to be deemed part of the *res gestae* simply because of the brief period intervening between the accident and the making of the declaration."

C. C. & C. R. R. Co. v. *John Mara*, 26 Ohio St. 185, was an action for damages sustained by plaintiff's wife, a passenger on defendant's train, while she was descending the car-steps in the act of alighting from the coach. Her husband was within a step or two of her at the time. She fell into the cattle-guard and he went to her rescue. Soon after this came the conductor and one, Nash, with their lanterns. Nash and the plaintiff helped her out. The following question was then put to the witness (p. 186): "While you and Nash were in the act of getting your wife out of the cattle-guard, *immediately* after the accident, did Mr. Nash ask her how she came to be there; did she make answer to it, and if so, what did she say?" The witness replied: "Nash asked her how she came to be thrown in there, and she told him she was jerked in while in the act of getting off the cars." This was held to be

error, for which the Supreme Court of Ohio reversed the judgment against the company. The court said: "We think the court erred in admitting proof of what was said by Mrs. Mara as to the cause of her fall or precipitation into the ditch of the cattle-guard. Although occurring *immediately* after the accident, it was no part of the *res gestae*, but a narration of a past transaction, and, therefore, mere hearsay." (See p. 190.) It will be observed that the train had not yet moved from its place at the time of the making of the declaration in the foregoing case, and that it was made in the presence of the conductor, and was *immediately* after the accident happened.

Luby v. *Hudson R. R. Co.*, 17 N. Y. 131, was an action for damages for personal injuries sustained by plaintiff in consequence of a railroad car running against her while it was being drawn by horses through the street. A policeman on the sidewalk was an eye witness to the occurrence, and immediately arrested the driver while he was still upon the car. He asked the driver, upon arresting him, why he did not stop the car, to which the driver replied that the brake was out of order. The Court of Appeals held that the admission in evidence of this conversation, which the court in its opinion stated "*took place directly after the accident*" (p. 132) was error.

The court further held that the evidence of the fact of the arrest of the driver was also error, being calculated to prejudice the minds of the jury. In *C. B. & Q. R. R. Co.* v. *Riddle*, 60 Ill. p. 534, the Supreme Court of Illinois stated the rule to be that "whenever or what the agent did is admitted in evidence, it is competent to prove what he said about *the act while doing it*." In *Mich. C. R. R. Co.* v. *Coleman*, 28 Mich. at p. 446, a statement by a brakeman, "a short time after the accident, that the train should have

stopped longer," was held inadmissible. In *Adams* v. *Hannibal & St. Jo. R. R. Co.*, 74 Mo., p. 553, a man walking upon a railroad trestle was killed by a train, which came to a halt as soon as possible after the accident. Thereupon the engineer and fireman of the train came up, and one said to the other: "If you had stopped the train when I told you, you would not have killed him" (pps. 555–556). The Supreme Court held that this statement was not admissible evidence. In *Hawkes* v. *B. & O. R. R. Co.*, 15 West Va., at p. 637, the Court of Appeals said: "Were these declarations a part of the *res gestae*, or were they a narrative *merely* of a past occurrence? If the first, they were evidence; if the last, they were not, *no matter how soon after the occurrence they were stated.*"

In *Lane* v. *Bryant* 9 Gray, 245, an action for damages by plaintiff for personal injuries sustained because defendant's servant drove his wagon against the plaintiff's carriage in one of the streets of Boston, the court below permitted a witness on behalf of the plaintiff to testify as to what the servant of the defendant said to the plaintiff *at the time of the accident and while the plaintiff was being extricated from his carriage and while the crowd was about.* The Supreme Judicial Court held that this evidence was improperly admitted and reversed the case. The court said:

"The declaration of the defendant's servant was incompetent, and should have been rejected. It was made after the accident occurred and the injury to plaintiff's carriage had been done. It did not accompany the principal act on which the whole case turned, or tend in any way to elucidate it. It was only the expression of an opinion about a past occurrence, and not part of the *res gestae*. It is no more competent because made *immediately* after the accident than if made *a week or month after*." (See p. 247.)

In *Pennsylvania Railroad Co.* v. *Books*, 57 Pa. 339, an action for personal injuries sustained by plaintiff by reason of a collision between the train on which he was a passenger and another train, a witness was offered to prove what the flagman said as to how far he had gone back to flag the train. The evidence was admitted, and the Supreme Court reversed the judgment on that account. Sharswood, J., delivering the opinion of the court, said:

"The rule is well settled that what an agent says, while acting within the scope of his authority, is admissible against his principal as part of the *res gestae*, but not statements or representations made by him *at any other time*."

In *Dietrich* v. *Baltimore and Halls Springs Ry. Co.*, 58 Md. 347, the declarations of a driver of a street car which ran against the plaintiff, made to the brother of the injured party, were held not to be competent. At page 356, the court said:

"But the act done by an agent can not be varied, qualified or explained either by declarations or denials made by him, which amounts to no more than a mere *narrative of past occurrences*, or by an *isolated* conversation held, or by an *isolated* act done at a subsequent time."

The principal case (*Vicksburg & Meridian* v. *O'Brien*, 119 U. S. 99), besides being a thoroughly considered and mature judgment of this court, has been referred to by this court in all subsequent cases upon this point (121 U. S. 649; 124 U. S. 423). It is evidently regarded by this court as a leading case upon the subject, and deservedly so.

That the admission of this evidence was prejudicial, see the observations of this court in *New Jersey Steamboat Company* v. *Crockett*, 121 U. S. 649, at bottom.

In the present case the court gave no instructions guarding against undue weight being given to the *harsh*

words admitted in evidence. On the contrary, full opportunity was given for their injurious effect, because the jury were told that if the conductor shot the plaintiff "wantonly and without any provocation *at the time*," the jury might award exemplary damages.

3. Under this assignment of error we claim, that if the court was correct in its charge that to justify the shooting it was necessary that Jopes should have had an actual intention to do Carlin bodily harm, then the proof tendered by the witness, Stockstill, was relevant, as a circumstance tending to show from Jopes' character for violence that he entertained such intention.

We cite in support of this proposition the following authorities:

Haller v. *State*, 37 Ind. 57.
State v. *Zellers*, 2 Halst. (N. J.) 230.
Pritchett v. *State*, 22 Ala. 39.
Queensberry v. *State*, 3 Street and Porter, 308.
Franklin v. *State*, 29 Ala. 14.
State v. *Keene*, 50 Mo. 357.
State v. *Bryant*, 55 Mo. 75.
People v. *Edwards*, 41 Cal. 640.
State v. *Tackett*, 1 Hawks (N. C.), 210.
State v. *Hogue*, 6 Jones (N. C.), 381.
State v. *Vansant*, 80 Mo. 67, 70.
Stewart v. *State*, 19 Ohio, 302.
Wharton on Criminal Evidence, §§ 69, 84.

We ask that the judgment of the court be reversed.

Respectfully submitted.

EDWARD COLSTON,
JOHN W. FEWELL,
Counsel for Plaintiff in Error.

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Supreme Court of United States.

OCTOBER TERM, 1891.

The New Orleans and North-eastern Railroad Company,
Plaintiff in Error,

No. 104.] *vs.*

Joseph H. S. Jopes,
Defendant in Error

BRIEF IN REPLY TO BRIEF FOR DEFENDANT IN ERROR.

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BRIEF IN REPLY TO BRIEF FOR DEFENDANT IN ERROR.

Since the brief for plaintiff in error was filed in this case, we have been furnished with copy of brief for defendant in error, which we had not seen before. There are several points made by counsel for defendant in error which we desire to notice.

I.

The defendant in error makes certain technical objections, as follows:

1. The exceptions are not shown to have been taken *at the trial.*

2. They are not shown to have been taken *while the jury was at the bar.*

3. The *grounds* of the objections were not given in any instance.

Of these in their order:

The defendant in error cites a number of cases (see p. 8 of his brief) to sustain his contention. We have read them all and find the following to be the purport of what is there decided:

In *Walton* v. *U. S.*, 9 Wheaton, at page 657, this court said:

"It will be sufficient, if exception be taken at the trial, and noted by the Court, with the requisite certainty; and it may, afterwards, during the term, according to the rules of the Court, be reduced to form, and signed by the Judge; and so, in fact, is the general practice." (See bottom of page 657–8.)

It is therefore not necessary that courts stop a jury trial to have a bill of exceptions written, signed, sealed and allowed, and entry to that effect made. To accelerate the hearing of cases, the practice is universal to take the exception, and permit the bill of exceptions to be signed, sealed, and allowed and made part of the record at any time before judgment. In that case no bill of exceptions was taken at all until after judgment. And although the evidence was objected to on the trial, no exception was taken.

In *Brown* v. *Clark*, 4 How. 4, this court said, speaking of the above practice:

"The practice is well settled and exceedingly plain and simple, and will be strictly adhered to by the court." (P. 15.)

The court in that case had some difficulty in noticing

the exceptions taken to the instructions, owing to the form in which they were presented by the record. The matter of doubt was whether the exception was taken to the instructions given to the jury, or whether the exceptions were to the refusal of the court to grant a new trial. (See p. 15, bottom.) But there can be no difficulty in determining in the case at bar that the exceptions were taken to the admission of the evidence, as well as to the instructions of the court.

In *French* v. *Edwards*, 13 Wallace, 506, the record showed that the court instructed the jury to find for the defendant and that the plaintiff excepted. The verdict was rendered on the 3d of April and the bill of exceptions was signed on the 13th of the same month, and judgment entered on the verdict on the 26th, after which day the court adjourned. Objection was taken to the bill of exceptions. (See p. 509, at bottom.) This court said (page 516):

"The objection to the bill of exceptions, that it does not purport to have been tendered and signed during the trial, is not tenable. It shows that the exceptions were taken at the trial, and that is sufficient. *It is dated during the term, and was in fact filed before the judgment on the verdict was entered.*"

In *Sheppard* v. *Wilson*, 6 How. 260, the bill of exceptions was not signed for more than two years after the trial. At page 274, the court said:

"The case was tried in the District Court of Scott county, at October term, 1841, and the bill of exceptions, which was struck from the records, was dated on the 21st of December, 1843. It did not purport to have been taken on the trial, nor was there evidence on the record that any exceptions were taken or noted by the judge. And,

assuming the fact as stated by the counsel for the defendant below, that he had taken the exceptions during the trial, and had reduced them to form afterwards, yet the bill was not settled during the term in consequence of objections made to certain matters therein by the opposite counsel; and the judge, though he signed a bill two years after the trial, refused to sign it *nunc pro tunc*, as if taken on the trial."

And at another place, page 275, the court said:

"It is too plain for argument, also, that a bill purporting to be taken more than two years after the trial could not be properly made part of the record, by any possible construction of this act."

The act spoken of was an act of the general assembly of the Territory of Iowa, where the case arose.

In *Phelps* v. *Mayer*, 15 How. 160, the court said, at page 161:

"The verdict was rendered on the 13th of December, and the next day the plaintiff came into court and filed his exception. There is nothing in the certificate from which *it can be inferred* that this exception was reserved pending the trial and before the jury retired. . . .

It has been repeatedly decided by this court, that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. . . . It need not be drawn out in form and signed before the jury retire; but must be taken in open court, and must appear, by the certificate of the judge who authenticates it, to have been so taken."

In *U. S.* v. *Breitling*, 20 How. 252, exceptions were drawn up in the form of a bill of exceptions pending the trial, and handed to opposite counsel for examination. Nothing more was heard of the bill of exceptions until

after the court adjourned. It was then presented to the court for signature, and was signed, sealed and allowed by the court, notwithstanding the objections of opposite counsel. It was held to be a good bill of exceptions. (See page 254.)

In *Barton* v. *Forsyth*, 20 How. 533, the exception was not taken until after the trial, verdict, and judgment, and then only in connection with the overruling of a motion made by defendant to have one Charles Ballance admitted as the real party in interest in the case. The transcript did not show that any exceptions were taken to the rulings of the court at the time they were made, nor that they were taken while the jury were at bar. The court said (p. 534):

"But in this case the exception was not proposed to be reserved until long after the trial was over, and the verdict and judgment had been entered."

But in the case at bar, the record shows that the exceptions to the introduction of evidence, and to the instructions given to the jury, and to the jury, and to those not given, were taken during the trial, and while the jury were at the bar. The bill of exceptions (marg. p. 17 of Record) shows that on the 14th day of May, 1888, at a regular term of court, the cause came on to be tried, and that a jury was impaneled and sworn, and that the following evidence was adduced on the part of the plaintiff. Then follows all the evidence offered by the plaintiff. The bill of exceptions then shows that the plaintiff rested (marg. p. 41, Record), and that the defendant offered certain evidence, which is set out in full. The first exception taken by defendant below to the introduction of evidence is found at marg. p. 33 of Record. It is in these words:

"*To the admission of all this evidence as to what Willis, Carlin, and Jopes said, the defendant objected; but the court overruled the objection, and held this testimony admissible as part of the res gestae, to which ruling defendant then and there excepted.*"

The exception appears by its place in the record to have been taken at the very time the evidence was introduced. The record says *the court overruled* the objection and held the testimony admissible, and that to this ruling the defendant *then and there* excepted. This ruling could only have been made pending the delivery of the evidence by the witness then on the stand, for, after the ruling and the exception, the narrative of the witness proceeds to the close of the examination. The presumption is the jury were then *at the bar*, we mean the bar of the court. These same observations are true of the exception to the evidence given by the witness Ferrell (see marg. p. 35, Record), and also to the exception taken to the exclusion of the evidence of the witness Stockstill (see marg. p. 48, Record).

The exceptions to the charge of the court are found at top page 24 of the record. The bill of exceptions was signed and sealed by the judge on the 16th of May, 1888. On the same day a motion for a new trial was filed (marg. p. 50). But this motion for a new trial was not overruled until the 26th day of May (see marg. p. 16, of Record). The entry *allowing* the bill of exceptions (sealed and signed on the 16th of May, 1888) recites that at a *later* day of the term the motion for new trial was overruled (we have seen it was the 26th of May), and that the defendant excepted and tendered its bill of exceptions, which is made part of the record (see top page 25). But this latter is a *nunc pro tunc* entry, and purports to have been made the

16th of May, the same day the bill of exceptions was signed.

It thus appears that all the exceptions were made *pending* the trial, while the jury were at the bar, but that the bill of exceptions was not formally signed, sealed, and allowed till the trial was over, which is in accordance with approved practice.

2. It is next claimed that the grounds of objection to the evidence should have been stated. *Coddington* v. *Richardson*, 10 Wall. 516, is cited as authority. But we find nothing in that case requiring the record to show that counsel state to the court the ground upon which objection to the evidence is made. The court in the case at bar understood the ground on which the objection was based, as is shown by the reasons the court gave for admitting the evidence.

II.

Our opponents next consider our exceptions to the admission of evidence. They claim these exceptions are not well founded, because they say: 1. The court below was not put in possession of the grounds of objection. This we have already answered sufficiently. 2. They claim that the exception to the admission of evidence is not well taken because they say the verdict was right, and that the admission of the objectionable evidence did no injury, because on another trial they could get just as large a verdict, without the aid of this evidence. Therefore, we ought not to trouble ourselves about the matter. This would come with better grace from our friends upon the other side, had they found it out before the present trial, and had been content to get along without these declara-

tions. Our opponents say it is highly improbable that this evidence had any effect upon the verdict. They cite *M'Lanahan* v. *Universal Ins. Co.*, 1 Peters, 170, but the authority does not sustain them. In that case this court said that granting a motion for a new trial was discretionary, and that a new trial would not be granted, if, upon a review of the whole evidence, the verdict was just. But, in regard to questions of law arising upon a writ of error, the court said:

"The case is far different upon a writ of error, bringing the proceedings at the trial, by a bill of exceptions, to the cognizance of the Appellate Court. The directions of the court must then stand or fall, upon their own intrinsic propriety, as matters of law." (See page 183.)

Mere improbability that evidence improperly admitted has affected the verdict will not remove the error. The presumption is that evidence improperly admitted has affected the result. As was said in *Wilson* v. *Barkalow*, 11 Ohio St. 470, par. 2 of the syllabus:

"Where hearsay testimony was objected to, but permitted to go to the jury, the judgment should be reversed unless it *manifestly appear* that this admission could not have prejudiced the party against whom it was offered." (See, further, page 475, at bottom.)

And this court has said in *Deery* v. *Cray*, 5 Wall. 807 (at bottom):

"We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. But whenever the application of this rule is sought, it must appear *so clear as to be beyond doubt* that the error did not and could not have prejudiced the party's rights."

Does it manifestly appear in this case that the admission of this evidence did not and could not affect the verdict of the jury?

In a case of this kind, where the amount to be recovered is left discretionary with the jury, it requires little argument to show how evidence of this character might prejudice a defendant railroad company. In *Lubly* v. *Hudson River R. R. Co.*, 17 N. Y. 131, cited at page 25 of our original brief, the Court of Appeals of New York held that it was prejudicial error to admit evidence that the driver of the car was arrested by a policeman. The court said:

"That fact was irrelevant to the case, and we can not tell what influence it may have had on the minds of the jury. It is true that the jury ought not to attach any importance to the circumstance in trying the issue before them, but this only proves that this fact ought not to have been shown for their consideration. It certainly has some tendency to prove that at the very time of the transaction the defendant's driver was considered by the officers and others as guilty of culpable negligence." (See p. 132.)

And the observations of this court in the case of *New Jersey Steamboat Co.* v. *Brockett*, 121 U. S., at bottom of page 649, show that the evidence improperly admitted in the case at bar was prejudicial. (See page 27 of our original brief.)

Our opponents next attempt to distinguish this case from that of *Vicksburg and Meridian R. R. Co.* v. *O'Brien*, 119 U. S. 99, but we think with little success. They say that case was decided by a divided court, which is true; but that only serves to show that the case was well considered. The case has been followed by this court, and is sustained by the best authority in the United States, and is a monu-

ment of the law of evidence. Our opponents cite as against that decision the case of *Hanover R. R.* v. *Coyle*, 55 Pa. St. 402. But what is said in the latter case is *obiter dictum*, as no question was raised in the record, the court saying that the paper-book discovered no bill of exceptions to the testimony of the declarations of the engineer. The court then proceeded to say that the exception would not have been good *if* it had been made. We hardly think this rises to the dignity of an authoritative decision, and it is contrary to subsequent decisions of the same court; for example, *Pennsylvania R. R. Co.* v. *Books*, 57 Pa. St. 339, cited page 27 of our original brief.

Our opponents also say that the conductor was the company and was in charge of Jopes as his passenger *all* the time, and that this justifies the admission of this evidence. On that theory, if the journey of Jopes had lasted for a week after the affray, and the conductor had made the statement at the end of that time, the evidence would have been competent; a proposition that will receive but little countenance, we take it, from this court.

Our opponents further say that the conductor was in court as a witness, and of contradicted the evidence as to his declaration, "and thus neutralized the error, if error there was." The unsoundness of this is apparent. How do our opponents know that the contradiction of the conductor would have neutralized the evidence? Why do they now say so when, at another part of their brief, they intimate that because a witness is a railroad employe, his testimony is entitled to no credence?

Our opponents next discuss the propriety of the charge

to the jury by the court, allowing them to award punitive damages "if the shooting was unprovoked in fact or in appearance," and say that no exception was taken, and then argue that if it had been taken, it would have been unavailing. It would be vain to discuss here what would have been the effect if an exception had been preserved. It is sufficient for us to say that in these cases of personal encounters, where the company does not ratify the act, but discharges the offending employe, which it did in this case promptly, it is not liable beyond compensatory damages.

III.

Our opponents next discuss the exceptions taken by defendant below to the instructions given and refused by the court, and to the refusal to give instructions asked by defendant. They say that the court did not err in refusing to charge the jury as requested by defendant below that if the conductor had reasonable cause to believe from Jopes's action that he was in great danger of bodily harm from Jopes and that it was necessary to shoot him to prevent it, they should find for the defendant, because they say the instruction did not include the idea that the conductor himself believed he was in such danger. But we think the request did include that idea. The charge as asked was that if the jury believed "from the evidence that *when Carlin shot the plaintiff*, he, Carlin, had reasonable cause to believe from Jopes's manner and attitude that he, Jopes, was about to assault Carlin with a knife, and that it was necessary to shoot him to prevent great bodily harm from Jopes, that then the jury should find for the defendant." (See margin page 49.)

It is presumed that one believes that which he has reasonable cause to believe. And the charge clearly presupposes that the conductor shot because it was necessary to do so to prevent great bodily harm from Jopes. It was evidently so understood by the court because the court charged the jury that "in that state of case, if Carlin shot under the mistaken *belief* from Jopes's action, that he was in danger of great bodily harm then about to be done him by Jopes, when in fact Jopes was not designing or *intentionally* acting so as to indicate such design, the plaintiff *should be* entitled to compensatory not punitive damages."

Our opponents next attempt to make a distinction between the doctrine of the criminal law and the law applicable to this case. We have sufficiently discussed this in in our original brief, and will not repeat the argument here. Their attempt at distinction proceeds upon the idea that because a railroad company has come under a contractual obligation to the passenger, the passenger may incite the servant to deeds of violence and yet hold the company liable for the consequences, if it should happen that the passenger was not really in earnest, but only practicing a rough joke. Practical jokers like Mr. Jopes must suffer the consequences if their antics are misconstrued. Our opponents state that the conductor was under a duty to protect Jopes. To protect Jopes from what? From his own misconduct? If a passenger sitting in a railway carriage protrudes his arm beyond the line of the window, whereby it is injured by contact with an object outside the car, the carrier is not responsible for such negligence; nor would it be responsible for injury done to the passenger who leaves the inside of the carriage and takes his place upon the platform whereby

he sustains an injury which would otherwise not have occurred to him. But if that same passenger, sitting in his seat, flies at the conductor when he comes to get the fare, with an open knife, with violent demonstration, thereby creating the impression upon the conductor that his life is in danger, and the conductor to protect himself assaults the passenger, our opponents say the company would be liable because the conductor is under a duty to protect the passenger. We think the unsoundness of such a position is manifest.

Our opponents next say it is clear that the jury determined in this case that the testimony of the conductor, which supplies the evidence upon which the charge asked by defendant below was predicated, is untrue; and that therefore there is nothing in the case to support such a request to charge. But how do our opponents know that the jury found the conductor's statement to be untrue? Did not the jury, on the contrary, find that the conductor's statement was true, but that Jopes was really not intending to do the conductor any harm, and that the conductor misinterpreted the purport of Jopes's action?

Mr. Jopes seems to have been fond of jokes. He now claims that what he said to the conductor about reporting him was said in a jocular way. We must then suppose that his lying in wait for the conductor behind the door of the ladies' car, as testified by Perry Rogers, was also a joke, and that when he said he would get even with the conductor he was merely joking.

This is sufficient to dispose of another suggestion made by our opponents to the effect that there is nothing in the evidence to support the distinction between apparent and real danger. They say that if there was any danger at all it was a real danger. But in this we think they are in error. Whether the danger was real or apparent, de-

pended solely upon the intention of Jopes, and on that subject we have shown in our original brief the respects in which the court erred.

Our opponents are very fond of repeating that the overwhelming evidence shows that the verdict was right in this case. We do not think it material to discuss that subject, and have refrained from doing so, but we are by no means prepared to concede what they claim in that regard. They say that the range of the bullets in the body of Jopes, being from left to right, proves that Jopes was not down upon the depot platform at any time, and that therefore the conductor's story is wholly without truth. Let us examine this. The train was going north, the station house at Nicholson, where it stopped, was on the west side of the track. Jopes came out of the front or north end of the smoking car, the conductor coming out of the south end of the baggage car next ahead, thus bringing the two men within elbow touch of each other. Jopes stood looking at the station, thinking, as he says, he might see his brother-in-law. According to his story he had an open knife in his hand resting on the rail next to the car. That would be in his left hand. While in this attitude he was facing west. The conductor in passing down the baggage car steps was on the right of Jopes. The conductor says upon reaching the depot platform he turned and walked forward toward the side door of the baggage car, when, looking back over his shoulder, he saw Jopes had descended to the depot platform, and was advancing toward him with his knife in his *right* hand, on which depot platform he had crept up on him four or five steps. If Jopes had remained on the car steps looking westward at the station, his left side could not have received the pistol shots from the conductor, but if Jopes had stealthily left the car platform without observation

from any one except the conductor, and had crept up on the conductor three or four paces, seeing which the conductor turned upon him with a pistol, causing Jopes to retreat and face inward to take refuge between the cars, his left side would have been presented to Carlin, and would have received the shots, and the shots would have passed through his body from left to right, precisely as testified by Jopes himself. (Record, p. 19.)

Respectfully submitted,

EDWARD COLSTON,
JOHN W. FEWELL,
Att'ys for Plaintiff in Error.

OCTOBER 27, 1891.

IN THE

SUPREME COURT OF THE UNITED STATES.

[No. 1110.]

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY, PLAINTIFF IN ERROR.

v.

JOSEPH H. S. JOPES, DEFENDANT IN ERROR.

ON ERROR FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF OF S. S. CALHOON AND MARCELLUS GREEN, FOR DEFENDANT IN ERROR.

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In order to determine the questions raised as to the ruling of the court, on the admission of testimony, and in its charges to the jury, it will be necessary to consider

THE TESTIMONY.

Mrs. Alice Gallander, Rec. p. 11, testified that Jopes got on the train with her and her children, they having met at the depot, and he assisted her on the train, that he was not intoxicated, that he sat in the same car she did, that when appellant's conductor came to take up the fares Jopes had a laughing conversation with him, and that she did not see, but heard, the shooting, which occurred about half a minute after Jopes left the car where she was, and that she did not see Jopes with any knife.

E. J. Sigarest, Rec. p. 14, testified that he was sitting at the station where the shooting occurred, that the conductor walked on the *depot platform* the length of a car and a half to a point opposite Jopes, who was standing on a *car*

platform, and, when about four feet from him, shot at him three times; when the last shot was fired Jopes had retreated inside the car, and that the conductor rushed in after him, that he saw Jopes do nothing to harm the conductor, that Jopes was sober, and witness did not notice that he had any knife; that he heard him say to the conductor, just after the shooting, "You have killed me for nothing," and that this witness assisted in removing Jopes' clothing and there was no weapon found on him.

E. B. Walker, (p. 16) testified that he was at the station where the shooting occurred, saw the conductor get off of the front end of the baggage car and walk down on the *depot platform* towards the rear of the train, to within a few feet of Jopes, who stood on the *car platform* with his hands on the railing, and shoot at him four times very rapidly, "saying nothing to Jopes and Jopes saying nothing to him that I heard;" that Jopes retreated into the car and the conductor followed him, when some one "I took to be one of the train men caught him by the arm." That Jopes came out of the other end of the car and said to the conductor, "Johnnie you have killed me what did you do it for?" And the conductor answered, "that's all right." That, at the close of the shooting, a Mr. Willis asked, "What's all this about?" and the conductor answered, "I shot the d—d son of a b—h."

(To this talk of the conductor defendant objected *without stating any grounds of objection.* The court overruled his objection and he excepted.)

Charles H. Ferrell (p. 17) testified that Jopes was near him in the car and had some talk with the conductor, which witness did not hear, when the conductor slapped Jopes on the back and both laughed, and the conductor passed on. That, at the station where the shooting occurred, witness went out of the car, Jopes coming on just behind him. Witness, having passed from the car on to the depot platform, heard a shot, wheeled around and saw the conductor standing on the *depot platform* firing at Jopes who was on the *car platform*; that neither of them said anything that witness heard, and witness was close to them, and he did

not see Jopes do anything to the conductor; that Jopes threw his hand up and staggered back into the car, that the conductor started into the car after him but two of the train men caught him; that the conductor fired four shots, as witness thinks, and fired them very rapidly. That immediately after the shooting, one Willis asked, "What's all this about?" and the conductor answered, "I have shot the s—t out of the d—d rascal."

(To this talk between Willis and the conductor defendant objected *without giving any grounds for his objection.* The court overruled the objection and defendant excepted.)

This witness further testified that Jopes was sober and doing nothing improper on the train, and that witness was only four or five feet off when the shooting began.

Jopes, the plaintiff, (p. 18) testified on his own behalf, that, when the conductor came to get his fare, he said to the conductor, "the other boys don't charge me anything on this road," and the conductor answered that he must pay his fare, which Jopes did, and then said, laughingly, "you have taken people to Meridian and back free," and the conductor answered, "*she* won't say so," to which witness replied, "she does say it, and I am going to squeal on you," all in a joking way. Witness having reference to a Mrs. Ferrell. That when the car whistled for Nicholson Station, witness was in his seat scraping his nails with a pocket knife. That he walked out on the car platform, with the knife open in his hand, and had it in his grasp on the railing of the platform, when he grasped the railing and looked out at the station, expecting possibly to see his brother-in-law among the people, and that he did not see the conductor until he commenced to shoot at him; that the conductor, Carlin, shot at him three or four times, and witness retreated and the conductor followed him up, put his pistol to his face and said, "give me that knife," which witness immediately did, when the conductor said, "now get off you son of a b—h." When two brakesmen and a porter caught hold of the conductor, and witness went rapidly through the car and got off at the other door.

That one shot entered the left shoulder of witness and

went into his breast, another entered his left side, going through both lungs, and another gave him a glancing shot in the breast; that all these wounds ranged from *left to right*; that the effects confined him to his bed three weeks; that he has suffered greatly ever since, being incapacitated by these wounds for the heavy work by which he had supported his family, and that, up to the time of testifying, he has been, and is, able only to do light jobs, and that he suffers great pain on any change of the weather; that he was not intoxicated; that he never had the knife up his sleeve and never advanced on the conductor with it; that the knife he had he had shortly before borrowed from a fellow workman in the shop.

(It was elicited by defendant from Jopes *on cross examination* that he was a sober and peaceable man, and that he had no difficulties with anybody.)

Here the plaintiff below rested and defendant introduced a letter of PERRY ROGERS, (p. 20), which was agreed should be read, his deposition having been mislaid. This witness was the employee of a railroad company, but not the defendant's, and testified that when the conductor went to get Jopes' fare, Jopes claimed that he did not pay any fare on that road, and the conductor said he could not ride unless he did pay, and that thereupon Jopes paid. That, at the next station, when the conductor came in, Jopes followed him and stood behind the door of a car watching him, that the conductor passed out by Jopes and something was said that the witness did not hear.

(The court will note that the conductor, in his testimony, to be subsequently stated, is silent as to this.)

The witness further said that Jopes had a dirk-knife up his sleeve, and said, as the witness passed him to get a drink of water, "I will get even with that fellow" That Jopes then went forward into the next car and that, as the train stopped, Jopes went out on the platform, and the next thing witness heard was the report of a pistol. That Jopes got down on the ground, took his coat off and grasped his own arm, which was bleeding, and that his *coat was on fire;* that Jopes said to the conductor, "I will

be even with you yet for this thing," and that the conductor said, "I don't want any more trouble with you sir."

(The court will note that all this is unsustained by any other witness in the case.)

Witness further testified that Jopes dropped the knife during the affray, and that witness had the impression that Jopes had been drinking, but he was not positive as to that; that "he acted very mean."

J. C. Carlin, the conductor, (p. 2), testified on behalf of defendant, that Jopes got on at Pearl River Station and told witness that he had never paid, and would not pay, any fare on that road, and that witness told him he had to pay or get off, and that Jopes said "I will pay it and get even with you.' That Jopes spoke of witness having passed a Mrs. Ferrell free and witness told him he was mistaken; that witness *thought* Jopes had been drinking and was disposed to be boisterous, swearing, etc.; that Jopes came forward into the smoking car, and witness, looking back from the baggage car, saw him slip a knife up his sleeve and that, thereupon, witness went to his valise in the baggage car and got his pistol from it; that, when the train stopped at Nicholson, witness went out on the rear platform of the baggage car and Jopes was standing on the *platform of the smoking car* with his knife in his right hand up his sleeve; that witness went on the *depot platform* and turned to walk towards the baggage car door, when, looking back over his shoulder, he saw Jopes on the *depot platform* advancing on him, and on which he had crept upon him four or five steps, with his knife in his right hand, and had got within four feet of witness when witness fired as rapidly as he could three or four shots at him; that Jopes retreated into the car, and that witness followed him and made him give up his knife.

(The court will note that defendant's witness ROGERS said that Jopes dropped the knife during the affray.)

This witness further testified that when Jopes asked him what he shot him for, he made no answer, and that witness spoke none of the insulting language testified to by the other witnesses.

(The court will note that this witness is alone in saying that Jopes was ever on the *depot platform* before the shooting; all the other witnesses on both sides negative this, and it is negatived even by defendant's witness Thomas J. Walker, who was introduced as a witness subsequently to conductor Carlin.)

Thomas J. Walker, (p. 22), testified on behalf of the defendant, that, when the train was about to stop at Nicholson Station, he started out of the front end of the smoking car and saw Jopes, and thought, from his manner, that he was either mad or intoxicated; that witness smelt whisky, but could not swear it was from Jopes, but it might have been from other men near him.

That the conductor commenced firing on some one on the *car platform*, the conductor being on the *depot platform*; that he saw the conductor very plainly and he was shooting *between* the rear end of the baggage car and the front end of the smoker, but he could not see at whom he was shooting.

(The court will note that this witness, *for the* defense, completely disposes of the conductor's story that Jopes was on the *depot platform* when he was shot.)

This witness further testified, that the conductor ran up on the car platform after shooting, saying "drop that knife."

Geo. W. Stockstill, (p. 23.) a witness introduced by the defense, was asked as to Jopes' character for peace or violence, to which question the court sustained plaintiff's objection unless the defendant could bring the knowledge of it home to the conductor.

The evidence closed here.

Defendant asked a charge to the effect that, the jury could not find for plaintiff if the conductor shot in a reasonable belief, from Jopes' actions, that he, the conductor, was in danger of loss of life or great bodily harm, whether he was in any such actual danger or not. The court would not so charge, but did instruct that, in such case, the jury should find compensatory and not punitive damages, and to this modification defendant excepted.

(The court will note that there is no exception taken to

the antecedent charge authorizing a verdict for punitive damages if the assault was wanton and unprovoked.)

The court instructed the jury that, if the evidence showed that the plaintiff was a passenger on the train, and that he was shot and wounded by the conductor whilst he was such passenger, and whilst prosecuting his journey, and such shooting was not in necessary self-defence, the plaintiff was entitled to recover compensatory damages. But, if the jury believed the plaintiff, when shot, was advancing on the conductor, or making hostile demonstrations towards him with a knife, in such a manner as to put the conductor in imminent danger of his life or of great bodily harm, and that the conductor shot plaintiff to protect himself, the plaintiff was not entitled to recover, but, if it appeared that the conductor shot the plaintiff whilst such passenger, and prosecuting his journey, wantonly, and without any provocation at the time, then the jury might award exemplary damages.

Responding to the request of the defendant that the court should instruct the jury that, if they believed from the evidence that, when Carlin shot the plaintiff, he, Carlin, had reasonable cause to believe, from Jopes' manner and attitude, that he, Jopes, was about to assault Carlin with the knife, and that it was necessary to shoot him to prevent great bodily harm from Jopes, then, that the jury should find for the defendant whether Jopes was intending to do Carlin great bodily harm or not; the court declined to so instruct, but instructed that, in that state of the case, if Carlin shot under the mistaken belief, from Jopes' actions, that he was in danger of great bodily harm then about to be done him by Jopes, when in fact Jopes was not designing, or intentionally acting, so as to indicate such design, the plaintiff would be entitled to compensatory damages and not punitive damages, to which (modification) defendant excepted.

THE LAW OF THE CASE.

And first some suggestions of technical law.

1. The bill of exceptions to the over-ruling of the mo-

tion for a new trial this court will not consider, as it is too well settled to need citation of authorities to show, and yet, this is the *only* bill of exceptions properly shown to be such in the record. See *printed rec. top p. 25 and top p. 24*, and conclusions, of both of the so called bills of exceptions

It is nowhere shown that the exceptions, or any of them, were taken *at the trial.*

Walton v. U S., 9 *Wheat.* 651;

French v. Edwards, 13 *Wallace*, 506;

Brown v. Clark, 4 *How.* 4;

Sheppard v. Wilson, 6 *How.* 260;

Phelps v. Mayer, 15 *How.* 160;

U. S. v. Gibert, 2 *Sum.* 22;

Nicoll v. American Ins. Co., 3 *W. & M.* 530;

Nor is it anywhere shown that any exception was taken *while the jury were at the bar.*

U. S. v. Brietling, 20 *How.* 252;

Barton v. Forsythe, 20 *How.* 532;

Phelps v. Mayer, 15 *How.* 160;

The *grounds* of the objection are not given in any instance.

Coddington v. Richardson, 10 *Wallace*, 516;

Wiley v. Robinson, *Hemp.* 41;

If the exception to the instructions of the court (see *printed rec. top page* 24,) be regarded as taken to *all* the propositions set forth in the instructions, the exception must be over-ruled it *any one* of the propositions be sound:

Johnson v Jones, 1 *Bl.* 209;

Rogers v. The Marshal, 1 *Wallace* 645;

Harvey v. Tyler, 2 *Wallace* 328.

This court, we assume, will not concern itself about the *facts* except to understand the charges of the court, to the jury, and its rulings on the admission and exclusion of evidence. The argument from the improbability of the attack by the conductor for so slight a cause, is answered by the like improbability of such an attack by Jopes. In cases like this it is the improbable which generally happens, and the proof here is overwhelming that the conduc-

tor made the attack, and that it was unprovoked by any movement on the part of Jopes. It is irresistibly shown by the evidence of every witness who testified about the shooting, except the conductor himself, that Jopes, when shot, was on the *car* platform and not on the *depot* platform, as the conductor testifies, and the range of the three bullets in Jopes' person shows conclusively that he was in no posture of attack.

The exceptions taken to the admission in evidence of what the conductor said just immediately after the shooting are without merit, as we respectfully submit. Our reasons are:

1. The court below was not put in possession of the grounds of the objection. The record shows a mere objection, without assigning wherein the evidence was objectionable, and in support of this we refer to the authorities *supra.*

2. The verdict was clearly right on the evidence, and there is no probability of any difference in another trial with this evidence in; and it is highly improbable that it had the effect to produce or modify the verdict. Its effect in producing the verdict, or making it larger, is imaginary

McLanahan v. Universal Ins. Co. 1 *Peters* 170.

Ex parte Marsh, 6 *Law Rep.* 67.

Mirick v. Hemphill, *Hemp.* 179.

3. It was competent in any point of view, as a legal proposition, both as part of the *res gestae* of the shooting, and because it was the verbal act of the agent of the company, as its conductor, made to a passenger, and while the contract of transportation still existed between the passenger and the railroad company, and while the railroad conductor was still in the discharge of his functions, as such conductor, and agent of the company, towards that passenger

This case differs from the case of the *Vicksburg & Meridian Railroad Company v. O'Brien* 7 *Supreme Court Reporter*, 118 in these regards:

First. It is not supposable that the language "may have had a decisive influence upon the result of the trial."

Second. The language was not a "declaration *after* the

(outrage on the passenger) had become a completed fact, and when he was not performing the duties of conductor;" on the contrary, it was strictly *a part of the fact* and "explanatory" of it, immediately at the conclusion of the assault, and before cooling time, and while the relation of passenger still existed.

In the *O'Brien case*, supra, the train was a wreck and the engineer's relations to the passengers and agency had entirely *ceased*, wherefore, what he said *ten to thirty minutes* after the wreck, in reference merely to the rate of speed, was held to be incompetent by a divided court. In the case at bar the conductor, who was the company, was still in charge of Jopes as his passenger all the time, and his language was immediately after the shooting, and had reference to that. See 55 *Pa. St.* 402, 47 *Mo.* 240, 57 *Mo.* 93. In addition to this the conductor was present in court and delivered testimony. If he had been first on the witness stand it would have been clearly competent to ask him of all this language, with a view to contradict him. When he did take the witness stand he was asked about it, and denied it, and thus neutralized the error, if there was error, which we deny.

But the act of the conductor towards that passenger was the act of the company, who are liable equally with him, a salutary principle it would be dangerous to depart from in these days when the world is in the hands of such agents.

The question as to the propriety of the charge that the jury might award punitive damages if the shooting was unprovoked in fact, or in appearance, is not in this case, because no exception was taken to that. If it were in the case it was right.

Wood on Master and Servant, 562, *et seq*, 572, 573, 580;
Thompson on Carriers, 350, *and Note*, 365-6-7-8-9 370;
1 Redfield on Railways, 544, *et seq.*;
Darral v. I. C. R. R. Co, 65 *Miss.*, 17;
Chicago R. R. Co., v. Scurr, 59 *Miss.*, 456;
V. & M. R. R. Co. v. Scanlan, 63 *Miss.*, 413.
Denver & R. G. R. R. Co. v. Harris. 7 *Sup. Ct. Rep.* 1287;
New Jersey S. B. Co. v. Brackett, *Ibid*, 1039-1041;

2 Wood on Railway Laws, 1191, 1194, *et seq.*;
3 Clifford 423, *et seq*;
53 Mississippi, 200; 38 *Miss.* 235;
36 Wisconsin, 657;
N. O. J. & G. N. R. R. Co. v. Bailey, 40 *Miss.*, 395.

The request of defendant that the court would charge that, when the conductor shot, if he had reasonable cause to believe from Jopes' actions that he was in danger of great bodily harm from Jopes, and that it was necessary to shoot him to prevent it, they must find for defendant, regardless of Jopes' intentions, was properly refused. It was too narrow as asked; it did not include the necessary idea that the conductor *himself believed* that he was in such danger, and that at the very time of the shooting, even if this doctrine of criminal law applied, and we say it does not apply.

The modification was proper, in permitting the jury in such case, to find compensatory damages. The whole matter amounts to nothing. The action is based on a violation of contractual rights of the passenger, which are not forfeited by presumption, but only by facts, to be shown by actual and not apparent occurrences. The conductor was under a duty to protect Jopes. From the evidence, if he was under any fear from Jopes' actions, he could easily have had his knife taken from him by the train hands. He never even asked his intentions or demanded his knife before he shot, but actually, beforehand, went to his valise and armed himself with a pistol for a fight. From his own statements it is plain he need not have shot. It is clear that the jury have determined his statement *untrue*, and untrue as to any condition of things which could support the modification, and therefore the defendant was not hurt by it. The instruction as asked justifies the breach of the contract by the conductor on mere appearance.

Under the overwhelming facts the verdict was right, even if regarded as compensation.

The court had charged that, if the conductor shot in self-defense, the verdict should be for the defendant. Now, there is no evidence tending to support any instruction as to apparent, and not real, danger. If the conductor's story

is true, there was manifestly *real danger* and *full justification*, as to which the defendant was fully protected by the instructions of the court. If the story of any other witness in the case is true, there was no danger from Jopes *either real or apparent*, and hence the charge was, as asked for, immaterial, if not erroneous. It seems to us that this is conclusive. If Jopes was on the *depot platform* advancing on Carlin with uplifted knife, there was real danger, and, if he was on the *car platform*, there could have been no danger to justify the shooting, real or apparent, either on a criminal or a civil trial.

We have not seen fit to discuss the question of the propriety of the ruling of the court excluding testimony as to the character of Jopes for peace or violence. We are aware of no principle justifying such evidence in a case like this.

We refer especially to the case of the *New Jersey R. R Co. v. Brackett*, *supra*, and the cases therein cited, for the duties of railroad companies to passengers, "to absolutely protect them against the misconduct of their own servants," and that their (the servants') misconduct, while transacting the company's business, and when acting within the general scope of their employment, is, of necessity, to be imputed to "their employers, and whether the act be one of omission or commission," and even if "disapproved or forbidden."

Respectfully submitted,

MARCELLUS GREEN,
S. S. CALHOON,
For Defendant in Error.

Office Supreme Court U. S.
FILED,
NOV 9 1891
JAMES H. McKENNEY

IN THE

SUPREME COURT OF THE UNITED STATES.

[No 104.]

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH H. S. JOPES, DEFENDANT IN ERROR.

Brief for Defendant in Error in Reply by S. S. Calhoon and Marcellus Green.

IN THE

SUPREME COURT OF THE UNITED STATES.

[No 104.]

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY, Plaintiff in Error,

vs.

JOSEPH H. S. JOPES, Defendant in Error.

Brief for Defendant in Error in Reply by S. S. Calhoon and Marcellus Green.

1. There was conflict of evidence on the material facts of the case and the jury disbelieved the conductor's story. According to plaintiff's evidence Jopes was standing upon the platform of the car, his hands resting on the rail, looking out for a relative, when the conductor, standing on the depot platform, at some distance, unprovokedly shot him when he was making no hostile demonstration and was not near enough to inflict any injury upon the conductor. According to the conductor's story Jopes was down on the depot platform, creeping up behind him with a large knife in his hand, and when within four or five feet of him he turned and fired rapidly.

The court, without objection from plaintiffs in error, instructed the jury upon these two hypotheses. The instructions as given were the accepted law of the case. Without complaining of the instructions as given, the plaintiffs in error sought an instruction to the effect that if the conductor had reasonable cause to believe

from Jopes, "manner and attitude" that he was about to assault him, and that it was necessary to shoot to protect himself, then the plaintiffs in error would not be liable; this the court refused but charged that in that state of case plaintiff could recover only compensatory damages.

Counsel complain of the whole charge. This cannot avail because there was no exception to the charge as given. The court did not err in refusing the instruction asked. 1. Because there was no evidence upon which to base the theory that the conductor could have been honestly mistaken from Jopes' "manner and attitude" that he was in danger of an assault. If Carlin's evidence was true, the danger was actually imminent. (R. 22.) If all the other witnesses testified truthfully, Carlin was in no danger, and the "manner and attitude" of Jopes was not such as to evince any design to assault or injure him. 2. Because it assumed that Jopes' "manner and attitude" were such as that the reasonable deduction might have been that they were threatening, when the evidence does not warrant such a conclusion. 3. Because it fails to define in what the "manner and attitude" consisted, which are to give support to the reasonable belief of danger. If there was no overt act, if the attitude was not threatening, evincing a design to do injury, the instruction would be erroneous. 4. Because, if the principles of the criminal law apply as contended, the prayer did not correctly announce the rules of law. It predicates self-defense upon the proposition that if Carlin "had reasonable cause to believe, from Jopes' manner and attitude," etc., omitting this necessary element, and if he did honestly believe. The facts and circumstances to create a reasonable belief to apprehend a design to do great bodily harm, and the honest belief that there is imminent danger of such design being accomplished, must both exist to justify the plea of self-defense.

Bangs v. The State, 60 Miss., 571.

The reference to the statute of Mississippi and its interpretation by counsel in the case of Dyson v. State, 26 Miss., 362, as countenancing the contention, is clearly erroneous. It was there decided that the statute did not dispense with the necessity of showing some overt act indicating a present intention to kill or do some great personal injury, and that the danger was imminent at the time of the killing. That it was intended to alter the common law rule so far as to justify a party acting conscientiously upon reasonable fears, founded on present overt acts to all appearances hostile, although there was no actual danger at the time.

This being the law of Mississippi, the collection of cases from other States announcing different rules is foreign to the discussion.

So, if the rules of the criminal law could be invoked, the refusal to charge as asked was correct.

The court upon this prayer instructed that if Carlin shot under the mistaken belief of danger, it would affect the measure of damages, in that, in that state of case there would be absence of wilfullness or wantonness, and of this no complaint is made and none could be made.

2. But the principles applicable to the trial of Carlin upon indictment for the assault and those governing the case at bar differ widely.

The cause of action was breach of the contract to carry safely. The defense sought excuse for the nonperformance, in that plaintiff had abandoned the contract and made an assault upon the servant of defendant to whose care he was committed, and that, therefore, defendant could not perform by reason of plaintiff's own act. Under this the facts must exist to excuse the breach. Not that the servant had reasonable cause to believe they existed, but that they existed in fact. Under the criminal law if there is a reasonable

doubt it suffices to excuse, but the non-performance of contracts cannot be excused upon beliefs. The reasonable ground for belief has no existence, even in estoppel *in pais*.

3. The doctrine contended for that the court will institute a comparative blame inquiry, and if the corporation or master was less to blame than the passenger, though the servant may be more to blame than the passenger, the master will be excused, is as surprising as it is untenable. Under it a corporation, being incorporeal, could never be liable for it, can only work through servants. *Qui facit per alium facit per se*, would exist no longer in jurisprudence if this was the law.

The cases cited for such a doctrine can have no application here.

Peary v. Georgia R. Co., 81 Ga., 485, cited as deciding this doctrine, expresses in the flippancy of its language the absence of sound judicial thought. The case was this: Under a statute it was made the conductor's duty to put off the train, using only necessary force, persons using obscene language or guilty of disorderly conduct. Peary had from his entrance upon the train violated the law, forfeited his right to carriage, and subjected himself to ejection from the cars. His conduct showed affirmatively, and forcibly an entire abandonment of the contract of carriage and a substitution therefor a personal difficulty with the conductor. From that time the conductor owed him no duty as the servant of the master, and they were strangers so far as tthe master's busines was concerned. It is true the opinion discourses upon the comparative blame of the master, the servant and the passenger, but it is clear that the relation of carrier and passenger did not exist at the time of the assault by the conductor. It is difficult to conceive how the liability of the master for the acts of the servant can be determined by the comparative blame of the master and

servant. If the servant's act is within the scope of his authority, the act is the master's and the doctrine of *respondent superior* applies

The case of Harrison v. Fink cited, is also a Georgia case, arising under this statute, in which the Peary case is cited. It is, with all deference, we submit, correctly decided, but from wrong reasons. The party had never paid his fare, had persistently refused to do so, and hence there was no contract of carriage made. He was a trespasser who had refused to establish contractual relations. The conductor as the servant of the master executing a contract of carriage was a stranger to him, for he openly declared *in haec foederi non veni*, and as such he could maintain no action on the contract of carriage.

So, we submit, these opinions do not recite correct reasons for their conclusions.

4. The argument in the brief upon the admissibility of the evidence of the declarations of Carlin need not be reiterated. Replying to the cases cited by opposing counsel we say, they are all cases of special and limited agencies, and the declaration was made after the agency in that matter had determined.

But here the conductor was the company, Chicago Railroad Co. v. Ross, 112 U. S., 390, and during the journey for which Jopes had taken passage he was charged with the duty of carrying him safely and protecting him. Any declarations made by the conductor during the journey were competent, just as those of any personal master would have been.

If the rights are to be measured by the criminal law applicable, the declarations of Carlin were competent.

Kendrick v. The State, 55 Miss., 436.

5. It was not error to refuse to permit Jopes' character, for peace or violence, to be inquired into. In the first place its only pertinency was as a basis to explain Carlin's conduct; but counsel admitted Carlin knew nothing of his character and hence it could explain